A/CN.4/SER.A/1989

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

1989

Volume I

Summary records of the meetings of the forty-first session

2 May-21 July 1989

UNITED NATIONS

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New York, 1992

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 . . . 1980).*

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

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

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

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

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

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This volume contains the summary records of the meetings of the forty-first session of the Commission (A/CN.4/SR.2095-A/CN.4/SR.2148), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/1989

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Mr. Jiuyong SHI	China
Mr. Luis SOLARI TUDELA	Peru
Mr. Doudou THIAM	Senegal
Mr. Christian TOMUSCHAT	Federal Republic of Germany
Mr. Alexander YANKOV	Bulgaria

OFFICERS

Chairman: Mr. Bernhard GRAEFRATH
First Vice-Chairman: Mr. Pemmaraju Sreenivasa RAO
Second Vice-Chairman: Mr. Emmanuel J. ROUCOUNAS
Chairman of the Drafting Committee: Mr. Carlos CALERO RODRIGUES
Rapporteur: Mr. Mohamed BENNOUNA

Mr. Vladimir S. Kotliar, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

AGENDA

The Commission adopted the following agenda at its 2095th meeting, held on 2 May 1989:

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

ABBREVIATIONS

ECE	Economic Commission for Europe
EEC	European Economic Community
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
ILO	International Labour Organisation
IMF	International Monetary Fund
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPU	Universal Postal Union
WIPO	World Intellectual Property Organization
World Bank	International Bank for Reconstruction and Development

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* *

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

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

MULTILATERAL CONVENTIONS CITED IN THE PRESENT VOLUME

	Source
Human rights	
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, *Treaty Series*, vol. 78, p. 277.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid.*, vol. 999, p. 171.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	*Ibid.*, vol. 993, p. 3.
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968)	*Ibid.*, vol. 754, p. 73.
International Convention on the Suppression and Punishment of the Crime of *Apartheid* (New York, 30 November 1973)	*Ibid.*, vol. 1015, p. 243.
Privileges and immunities, diplomatic relations	
Convention on the Privileges and Immunities of the United Nations (London, 13 February 1946)	*Ibid.*, vol. 1, p. 15.
Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947)	*Ibid.*, vol. 33, p. 261.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	*Ibid.*, vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	*Ibid.*, vol. 596, p. 261.
Convention on Special Missions (New York, 8 December 1969)	United Nations, *Juridical Yearbook* 1969 (Sales No. E.71.V.4), p. 125.
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973)	United Nations, *Treaty Series*, vol. 1035, p. 167.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.
Law of treaties	
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, p. 331.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Law of the sea	
Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)	United Nations, *Treaty Series*, vol. 516, p. 205.
Convention on the High Seas (Geneva, 29 April 1958)	*Ibid.*, vol. 450, p. 11.

	Source
Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958)	*Ibid.*, vol. 559, p. 285.
Convention on the Continental Shelf (Geneva, 29 April 1958)	*Ibid.*, vol. 499, p. 311.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF. 62/122.

Liability for damage caused by nuclear and outer space activities

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

CHECK-LIST OF DOCUMENTS OF THE FORTY-FIRST SESSION

Document	*Title*	*Observations and references*
A/CN.4/418	Provisional agenda	Mimeographed. For the agenda as adopted, see p. ix above.
A/CN.4/419 [and Corr.1] and Add.1	Seventh report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	Reproduced in *Yearbook . . . 1989*, vol. II (Part One).
A/CN.4/420	Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier: comments and observations received from Governments	*Idem.*
A/CN.4/421 [and Corr.1, 2 and 4] and Add.1 and 2	Fifth report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	*Idem.*
A/CN.4/422 [and Corr.1] and Add.1 [and Add.1/Corr.1]	Second report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur	*Idem.*
A/CN.4/423 [and Corr.1 and 2]	Fifth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	*Idem.*
A/CN.4/424 [and Corr.1]	Fourth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	*Idem.*
A/CN.4/425 [and Corr.1] and Add.1 [and Add.1/Corr.1]	Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur	*Idem.*
A/CN.4/L.431	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-third session of the General Assembly	Mimeographed.
A/CN.4/L.432	Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Titles and texts adopted by the Drafting Committee on second reading: articles 1 to 32 and draft Optional Protocols One and Two	See summary records of the 2128th meeting (paras. 16 *et seq.*), 2129th meeting (paras. 1-103) and 2130th to 2132nd meetings.
A/CN.4/L.433	Draft articles on the draft Code of Crimes against the Peace and Security of Mankind. Titles and texts adopted by the Drafting Committee: articles 13, 14 and 15	See summary records of the 2134th meeting (paras. 49 *et seq.*), 2135th meeting and 2136th meeting (paras. 1-41).
A/CN.4/L.434	Draft report of the International Law Commission on the work of its forty-first session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10* (A/44/10). The final text appears in *Yearbook . . . 1989*, vol. II (Part Two).
A/CN.4/L.435 and Add.1-4 [and Add.4/Corr.1]	*Idem*: chapter II (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	*Idem.*
A/CN.4/L.436 and Add.1-3	*Idem*: chapter III (Draft Code of Crimes against the Peace and Security of Mankind)	*Idem.*
A/CN.4/L.437	*Idem*: chapter IV (State responsibility)	*Idem.*
A/CN.4/L.438	*Idem*: chapter V (International liability for injurious consequences arising out of acts not prohibited by international law)	*Idem.*
A/CN.4/L.439 and Add.1 and 2	*Idem*: chapter VI (Jurisdictional immunities of States and their property)	*Idem.*
A/CN.4/L.440 [and Corr.1] and Add.1 and 2	*Idem*: chapter VII (The law of the non-navigational uses of international watercourses)	*Idem.*
A/CN.4/L.441	*Idem*: chapter VIII (Relations between States and international organizations (second part of the topic))	*Idem.*
A/CN.4/L.442	*Idem*: chapter IX (Other decisions and conclusions of the Commission)	*Idem.*
A/CN.4/SR.2095-A/CN.4/SR.2148	Provisional summary records of the 2095th to 2148th meetings	Mimeographed. The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FORTY-FIRST SESSION

Held at Geneva from 2 May to 21 July 1989

2095th MEETING

Tuesday, 2 May 1989, at 3.15 p.m.

Outgoing Chairman: Mr. Leonardo DÍAZ GONZÁLEZ
Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Opening of the session

1. The OUTGOING CHAIRMAN declared open the forty-first session of the International Law Commission and welcomed the members of the Commission and its secretariat, particularly its new Secretary, Mr. Vladimir Kotliar.

Statement by the outgoing Chairman

2. The OUTGOING CHAIRMAN said that, as instructed by the Commission, he had attended the forty-third session of the General Assembly to introduce to the Sixth Committee the Commission's report on its fortieth session (A/43/10).[1] The text of the statement he had made on that occasion,[2] as well as the summary records of the meetings the Sixth Committee had devoted to the report and the topical summary of the debate prepared by the Secretariat (A/CN.4/L.431), were available to members of the Commission, who would thus see that the discussion had on the whole been very positive and that most delegations had expressed a favourable opinion of the Commission's work.

3. Some aspects of the Sixth Committee's discussions nevertheless called for comment. First, it should be noted that some delegations—admittedly very few in number—had spent more time criticizing the Commission's procedures and methods of work than objectively assessing the results achieved in the past 40 years precisely by means of those methods. After so many debates on the Commission's procedures and methods of work, however, it should be obvious by now that, although the ones it used were not ideal, they were the best suited to its needs and to its specific features, and thus the most effective.

4. It should also be noted that very few delegations had responded to the appeal made by the Commission, in accordance with a request by the General Assembly, for comments on the specific points on which the Commission would like Governments to give it the necessary guidance in its work. He himself had not failed to stress that point in the statement he had made to the Sixth Committee.

5. There had, moreover, been a misunderstanding in connection with the Commission's report: many representatives had referred in their statements not to the report of the Commission itself, but to the reports of special rapporteurs or to proposals by the Drafting Committee. That misunderstanding might well be the result of the way in which the Commission's report was presented. It had to be made clear that what the Commission submitted to the General Assembly was the outcome of its discussions in plenary meetings, in other words the proposals, draft articles and commentaries adopted by the Commission as a whole. It was inadmissible for the Sixth Committee's debates to deal with proposals that were contrary to what the Commission as a whole had decided in its report, and any possible misunderstanding on that score must be avoided in the future.

6. There had been a further misunderstanding with regard to the Commission's methods of work, which some delegations had, for reasons that were not always very clear, taken as their central theme. They had apparently assumed that the International Law Commission was a working group of the Sixth Committee and had thus been unaware, or pretended to be unaware, of the fact that, although the Commission was a subsidiary body of the General Assembly, it had the distinctive characteristic of having been given considerable independence and of having its own statute, so that its members were elected in their personal capacity and not as representatives of Governments, making it the master of its own procedure.

7. One of the criticisms made by that same small group of delegations concerned the Commission's output and the way in which it made use of the time allocated to it—a strange criticism coming from a Committee that was not exactly a model of punctuality. It was paradoxical, too, that the Commission was reproached for submitting unduly voluminous reports, in particular so far as the historical background to the various topics under consideration was concerned, when the complaint was also made that it was difficult for persons who had not followed the Commission's work for several years to understand the content of its report precisely because they did not know the origins and purpose of all the proposals put forward in it. Admittedly, representatives of Governments in the General Assembly changed frequently. Perhaps the Commission should therefore reflect on what could be done to solve the following problem: how could it discharge its obligation to the General Assembly by submitting the results of its

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[1] See *Yearbook . . . 1988*, vol. II (Part Two).

[2] See *Official Records of the General Assembly, Forty-third Session, Sixth Committee*, 25th meeting, paras. 1-71.

work to it in as comprehensive and analytical a manner as possible and thus provide Governments with all the elements necessary for taking a position on the proposals submitted to them, while ensuring that, as it was entitled to expect, the General Assembly would consider its report with the required care and attention? It should not be forgotten in that connection that the Commission's report was also a working tool much appreciated by specialists in international law and that it had at times even been cited in judgments of the ICJ.

8. For his part, he would suggest two solutions to the problem, on the understanding that the matter would be considered by the Planning Group if the Commission decided to re-establish it at the current session. The first solution would be for the Commission's report to be considered by the Sixth Committee not in the year in which it was submitted, but the following year, so that Governments would have sufficient time to study it in depth and give the necessary instructions to their delegations in full knowledge of the facts. The obvious drawback to that solution was that the special rapporteurs and the Commission itself would not be able to take the comments of the Sixth Committee into account at the following session; but to overcome that, the Commission could stagger or alternate the consideration of the various topics before it. The other possibility would be for Governments to submit their comments in writing within a fairly brief period so that the Secretariat could make a summary of them; that would, incidentally, not prevent delegations in the Sixth Committee from making any comments, if necessary, during its meetings.

9. As to the *Ad Hoc* Working Group established by the Sixth Committee under paragraph 6 of General Assembly resolution 42/156 of 7 December 1987, it had been obliged, after a number of meetings, to acknowledge the obvious fact that its objective could not be to lay down rules or impose guidelines on the Commission with regard to its methods and procedures, which were governed by the Commission's statute. The text of the report made by the Chairman of the Group to the Sixth Committee[3] had been circulated to members of the Commission.

10. Referring to the question of co-operation with other bodies, he informed the Commission that he had attended, as an observer, the session of the European Committee on Legal Co-operation held at Strasbourg in November-December 1988, at which it had been suggested that a session of the European Committee should be held concurrently with the Commission's session in order to deal with questions of joint interest to both bodies. He had also represented the Commission at the meeting of the Asian-African Legal Consultative Committee held at Nairobi in February 1989. At that meeting, the Legal Advisers of Sweden and Finland had proposed that a seminar should be held, under the auspices of the United Nations and during the forty-fourth session of the General Assembly, on a question of concern to the Asian-African Legal Consultative Committee, namely pollution and the environment.

11. In addition, Mr. Koroma had represented the Commission at a meeting on river and lake basin development organized by the Economic Commission for Africa at Addis Ababa in January 1989; and Mr. Pawlak had represented the Commission at the meeting of the International Law Association held at Warsaw in August 1988.

12. Mr. KOROMA said that, while he shared most of the views expressed by the outgoing Chairman, he regarded the criticism by the Sixth Committee as a way of encouraging the Commission to improve its methods of work and procedures. It was also encouraging to note that the participants in the meeting at which he had given a detailed account of the Commission's work on the law of the non-navigational uses of international watercourses had broadly agreed with the recommendations made by the Commission on that topic.

The meeting was suspended at 4 p.m. and resumed at 4.20 p.m.

Election of officers

Mr. Graefrath was elected Chairman by acclamation.

Mr. Graefrath took the Chair.

13. The CHAIRMAN thanked the Commission for the honour it had paid his country and himself by electing him Chairman and for the confidence it had thus shown in him. He would endeavour to follow the example of objectivity and impartiality set by his predecessors. He expressed his gratitude to the outgoing Chairman for the talent with which he had conducted the work of the previous session and represented the Commission at the forty-third session of the General Assembly and said he was convinced that the Planning Group would pay the closest attention to his interesting suggestions.

14. He appreciated the opportunity he had been given to preside over the current session, which marked the fortieth anniversary of the Commission's establishment. The Commission's drafts and proposals, as well as the reports of its special rapporteurs, represented an extremely important contribution to the development of international law and to the legal order of today's international community. At its first session, in 1949, the Commission had included among the topics selected for codification two that were central to its current work, namely jurisdictional immunities of States and their property, and State responsibility, and had appointed a special rapporteur to prepare a draft code of offences against the peace and security of mankind, another topic that was still on its agenda. Those three topics were particularly qualified to consolidate the international legal system.

15. It was also at its first session that the Commission had prepared the draft Declaration on Rights and Duties of States,[4] which had greatly influenced the later work that had led to the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[5] a body of rules which had lost none of their topicality.

16. He was sure that, thanks to the competence, experience and co-operation of its members, the Commission would succeed in making good progress in its work at the current session.

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[3] *Ibid.*, 40th meeting, paras. 10-18.

[4] See *Yearbook . . . 1949*, pp. 286 *et seq.*

[5] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

Mr. Sreenivasa Rao was elected First Vice-Chairman by acclamation.

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

Mr. Calero Rodrigues was elected Chairman of the Drafting Committee by acclamation.

Mr. Bennouna was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/418)

17. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/418), on the understanding that its adoption would be without prejudice to the order of consideration of the topics, which would be decided later.

The provisional agenda (A/CN.4/418) was adopted.

18. The CHAIRMAN, drawing attention to General Assembly resolution 43/169 of 9 December 1988, suggested that the request in paragraph 5 of that resolution should be taken up under agenda item 9 (Programme, procedures and working methods of the Commission, and its documentation), which was to be referred to the Planning Group.

It was so agreed.

Organization of work of the session

[Agenda item 1]

19. The CHAIRMAN said that, in addition to the officers of the current session, the Enlarged Bureau would be composed of the special rapporteurs and members who had formerly been Chairman of the Commission, namely Mr. Arangio-Ruiz, Mr. Barboza, Mr. Díaz González, Mr. McCaffrey, Mr. Ogiso, Mr. Thiam, Mr. Yankov, Mr. Francis and Mr. Reuter.

20. Mr. KOROMA said that, in future, the Commission should have before it at the beginning of the session a summary table showing the stage reached in the preparation of each of the reports to be discussed.

The meeting was suspended at 5.15 p.m. and resumed at 5.55 p.m.

21. The CHAIRMAN, referring to the reports to be discussed by the Commission, said that four had still not been issued and would be distributed between 17 May and 1 June. The Commission would also have before it the second report by Mr. Ogiso on jurisdictional immunities of States and their property and would consider it together with his preliminary report, which it had been unable to discuss at the previous session. Because the reports would be available at different times, the Enlarged Bureau recommended that the Commission should consider the items on the agenda in the following provisional order:

1.	Draft Code of Crimes against the Peace and Security of Mankind (item 5)	7 meetings
2.	State responsibility (item 2)	7 meetings, plus a further two meetings later
3.	International liability for injurious consequences arising out of acts not prohibited by international law (item 7)	5 meetings, plus one further meeting later
4.	Jurisdictional immunities of States and their property (item 3)	7 meetings
5.	The law of the non-navigational uses of international watercourses (item 6)	6 meetings
6.	Relations between States and international organizations (second part of the topic) (item 8)	2 meetings

The Commission would set aside four meetings for consideration of the reports of the Drafting Committee and would also make time available for receiving the representatives of the legal bodies with which it co-operated.

22. If there were no objections, he would take it that the Commission agreed to adopt that provisional plan of work.

It was so agreed.

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

[Agenda item 9]

MEMBERSHIP OF THE PLANNING GROUP OF THE ENLARGED BUREAU

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

It was so agreed.

24. The CHAIRMAN recalled that, at its previous session,[6] the Commission had decided to establish a Working Group which would suggest topics for inclusion in the Commission's long-term programme of work. The Enlarged Bureau proposed that the members of the Commission from the five regional groups should meet to appoint one representative from each as a member of the Working Group, which would elect its own chairman.

The meeting rose at 6.30 p.m.

[6] See *Yearbook . . . 1988*, vol. II (Part Two), p. 110, para. 557.

2096th MEETING

Wednesday, 3 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley,

Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Drafting Committee

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

It was so agreed.

Draft Code of Crimes against the Peace and Security of Mankind[1] (A/CN.4/411,[2] A/CN.4/419,[3] A/CN.4/L.431, sect. D, ILC(XLI)/Conf.Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR

ARTICLE 13 (War crimes) *and*

ARTICLE 14 (Crimes against humanity)

2. The CHAIRMAN invited the Special Rapporteur to introduce his seventh report on the topic (A/CN.4/419), as well as draft articles 13 and 14[4] contained therein, which read:

CHAPTER II
ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

...

Article 13. War crimes

FIRST ALTERNATIVE

(*a*) Any [serious] violation of the laws or customs of war constitutes a war crime.

(*b*) Within the meaning of the present Code, the term "war" means any international or non-international armed conflict as defined in article 2 common to the Geneva Conventions of 12 August 1949 and in article 1, paragraph 4, of Additional Protocol I of 8 June 1977 to those Conventions.

SECOND ALTERNATIVE

(*a*) Within the meaning of the present Code, any [serious] violation of the rules of international law applicable in armed conflict constitutes a war crime.

(*b*) The expression "rules of international law applicable in armed conflict" means the rules laid down in the international agreements to which the parties to the conflict have subscribed and the generally recognized principles and rules of international law applicable to armed conflicts.

Article 14. Crimes against humanity

The following constitute crimes against humanity:

1. Genocide, in other words any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

(i) killing members of the group;

(ii) causing serious bodily or mental harm to members of the group;

(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) imposing measures intended to prevent births within the group;

(v) forcibly transferring children from one group to another group.

2. FIRST ALTERNATIVE

***Apartheid*, in other words the acts defined in article II of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* and, in general, the institution of any system of government based on racial, ethnic or religious discrimination.**

2. SECOND ALTERNATIVE

***Apartheid*, which shall include policies and practices of racial segregation and discrimination [as practised in southern Africa] and shall apply to the following inhuman acts committed for the purpose of establishing or maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:**

(*a*) denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) by murder of members of a racial group or groups;

(ii) by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

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

(*c*) any legislative measures and other measures calculated to prevent a racial group or groups from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(*d*) any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of marriages among members of various racial groups, and the expropriation of landed property belonging to a racial group or groups or to members thereof;

(*e*) exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] Revised texts of draft articles 13 and 12, respectively, submitted by the Special Rapporteur in 1986 in his fourth report (*Yearbook . . . 1986*, vol. II (Part One), pp. 85-86, document A/CN.4/398).

(*f*) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose *apartheid*.

3. Slavery and all other forms of bondage, including forced labour.

4. (*a*) Expulsion or forcible transfer of populations from their territory;

(*b*) Establishment of settlers in an occupied territory;

(*c*) Changes to the demographic composition of a foreign territory.

5. All other inhuman acts committed against any population or against individuals on social, political, racial, religious or cultural grounds, including murder, deportation, extermination, persecution and the mass destruction of their property.

6. Any serious and intentional harm to a vital human asset, such as the human environment.

3. Mr. THIAM (Special Rapporteur) said that his seventh report (A/CN.4/419) dealt with war crimes and crimes against humanity, questions which the Commission had already discussed at length. The purpose of the report was essentially to propose specific texts for draft article 13, on war crimes, and draft article 14, on crimes against humanity. The report also gave a brief account of the doctrinal discussions on the subject and of earlier debates, largely intended for the more recently elected members of the Commission who had not been able to follow all of the Commission's discussions on the present topic. They could, of course, raise issues of principle in connection with the discussion of draft articles 13 and 14, but there would be no need to reopen the general debate.

4. Draft article 13 raised three problems relating to definition, terminology and the question whether a certain degree of gravity was necessary for an offence to constitute a war crime.

5. With regard to the first issue, the choice lay between an exhaustive enumeration of war crimes and a general definition. A really exhaustive list, however, was virtually impossible. The Hague Convention (IV) of 1907[5] had had recourse to the famous Martens clause (*ibid.*, para. 5) whereby acts not specifically enumerated in the Convention could be treated as violations of the laws of war if they violated the principles of the law of nations. In the 1954 draft code, the Commission had avoided the enumerative approach and had adopted a general definition of war crimes as "acts in violation of the laws or customs of war" (art. 2, para. (12)), following the advice of the then Special Rapporteur, the late Jean Spiropoulos, who had urged that it should be left to the judge to determine whether the case in question was one involving a war crime (*ibid.*, para. 7).

6. A general definition would be consistent with the judgment of the Nürnberg International Military Tribunal,[6] according to which the law of war was to be found in customs and practices which had gradually obtained universal recognition, and in the general principles of justice applied by jurists and practised by military courts. Leading jurists who had examined the problem also agreed that an exhaustive list of war crimes was impossible. For all those reasons, he proposed the general definitions of war crimes appearing in the two alternatives of paragraph (*a*) of article 13.

7. The second problem was that of terminology. It had been suggested that the expression "war crime" was outmoded and that the word "war" should be replaced by "armed conflict". However, a very large number of conventions and other international instruments used the traditional expression "laws or customs of war", which was to be found more particularly in the 1907 Hague Convention, in the Charter of the Nürnberg Tribunal[7] (art. 6 (*b*)) and in the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal)[8] (art. 5 (*b*)). In the first alternative proposed for article 13, the traditional term "war" was used. In the second, he had introduced the concept of "armed conflict" to replace that of "war". It would be for the Commission to choose between those alternatives.

8. The third problem arising out of article 13 was whether a certain degree of gravity was necessary for an offence to be considered as a war crime. There had been no reference to the question of the gravity of the offence either in the 1907 Hague Convention or in the Charters of the Nürnberg and Tokyo Tribunals. Nor was any such reference made in either Law No. 10 of the Control Council for Germany[9] or the 1954 draft code. The criterion of gravity appeared in the 1949 Geneva Conventions[10] and in Additional Protocol I[11] thereto, article 85, paragraph 5, of the latter instrument specifying that "grave" breaches of humanitarian law constituted war crimes (*ibid.*, paras. 18-19). During its own discussions prior to the adoption of the 1954 draft code, the Commission had examined a proposal by one of its members, the late Manley O. Hudson, to introduce the element of gravity in the definition of war crimes.[12] The Special Rapporteur at the time, Jean Spiropoulos, had objected that he considered "every violation of the laws of war as a crime".[13]

9. His own view was that the matter had to be reconsidered carefully. Some judicial decisions rendered immediately after the Second World War had treated offences of a somewhat minor character as war crimes, but they could be explained by the feelings prevailing at the time and the desire of the courts to punish as many as possible of the persons responsible for committing abuses during the war. The position was now different and the subject should be approached in a different frame of mind. The term "crime" could no longer be used with the broad meaning attached

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[5] Convention respecting the Laws and Customs of War on Land, of 18 October 1907 (see J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1918), p. 100).

[6] See United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7).

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

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

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

[10] Geneva Conventions of 12 August 1949 for the Protection of War Victims (United Nations, *Treaty Series*, vol. 75).

[11] Protocol I relating to the protection of victims of international armed conflicts, adopted at Geneva on 8 June 1977 (*ibid.*, vol. 1125, p. 3).

[12] See *Yearbook . . . 1950*, vol. I, pp. 148-149, 60th meeting, paras. 12 and 21.

[13] *Ibid.*, p. 149, para. 15.

to it in the instruments drawn up during the Second World War. As far as the present draft code was concerned, the purpose was to sanction particularly serious and odious crimes. Offences of lesser gravity should be excluded from the scope of the definition of "war crimes", which did not mean, of course, that they should go unpunished. The term "serious" appeared in square brackets in the two alternatives of paragraph (*a*) of article 13. The Commission would have to decide whether it wished to retain that adjective, and consequently the criterion of gravity, in the definition of war crimes.

10. As to draft article 14, the 1954 draft code contained neither the expression "crimes against humanity" nor the word "genocide", although the former expression was included in the Charters of the Nürnberg and Tokyo Tribunals, as well as in Law No. 10 of the Allied Control Council (*ibid.*, para. 37). The Nürnberg Judgment also used the expression "crimes against humanity", as did Principle VI (*c*) of the Nürnberg Principles[14] formulated by the Commission in 1950. The gap should therefore be filled and the expression "crimes against humanity" used in the draft code. Crimes against humanity differed materially from war crimes, which presupposed a state of armed conflict and were directed against belligerent enemies. Crimes against humanity could be committed at any time, against any persons, and in particular against one's fellow citizens.

11. The various subparagraphs of paragraph 1 of draft article 14 set forth specific acts constituting genocide. It should not be assumed that "crimes against humanity" meant solely acts of barbarity and physical ill-treatment. The expression also covered humiliating or degrading acts. In that connection, it was interesting to note a decision of the Supreme Court of the British Zone in Germany (*ibid.*, para. 45).

12. Attacks on property had been regarded by the courts as crimes against humanity when they occurred on a massive scale. As for crimes against persons, the International Military Tribunals had dealt with both mass crimes and crimes against individuals. The question remained open as to whether the criterion of "mass nature" was the only necessary condition for an offence against property to be treated as a crime against humanity.

13. *Apartheid* was included in draft article 14, for notwithstanding certain reservations of principle the Commission as a whole was in full agreement that it should be regarded as a crime against humanity. To meet the requests of certain members, he had also included, in separate provisions, slavery and the mass expulsion of populations from their territories.

14. Lastly, he trusted that, rather than revert to a general debate, the Commission would concentrate its discussion on the draft articles he had introduced.

15. Mr. TOMUSCHAT commended the Special Rapporteur for his succinct and lucid seventh report (A/CN.4/419) and for the clarity of his oral introduction.

16. He agreed entirely on the need for a general definition of war crimes in draft article 13. An enumeration could never be exhaustive, particularly since humanitarian law was developing rapidly.

17. Of the two alternatives proposed for article 13, he preferred the second. To begin with, war was not the only phenomenon to which humanitarian law applied. The notion of armed conflict which had rightly been introduced into all recent instruments would help to avoid any misunderstanding. It would be preferable to follow that modern terminology and for the draft code to speak of armed conflict, despite the Special Rapporteur's explanation that the term "war" encompassed all forms of armed conflict. A further reason for preferring the second alternative was that, since humanitarian law was now widely codified, it would be advisable to dispense with the reference to "customs of war" and to speak solely of the rules "applicable in armed conflict". That was particularly true in the delicate area of penal law, where it was better to have written norms.

18. Should the Commission favour the first alternative, however, the wording of paragraph (*b*) should be reexamined in the light of article 3 common to the 1949 Geneva Conventions[15] and of article 1, paragraph 4, of Additional Protocol I thereto,[16] which, on his reading, assimilated armed conflicts with inter-State conflicts in the traditional sense. It would also be advisable, in connection with non-international conflicts, to refer to Additional Protocol II,[17] although that could lead to controversy because Protocol II had not been ratified by many States.

19. He agreed about the need to introduce the criterion of gravity in draft article 13, but would note in that connection that the French expression *violation grave* had been rendered in English as "serious violation", whereas the Additional Protocols spoke of a "grave breach". If the French text of the draft code was to follow the wording of the Additional Protocols, the English text should do likewise.

20. A further question of co-ordination between the Additional Protocols and the draft code arose. Turning any grave breach of the rules applicable in armed conflict into a war crime might be going beyond the terms of the Additional Protocols, which defined grave breaches very narrowly. The Commission would therefore have to decide whether the draft code should be brought into line with the two Additional Protocols or whether a more general formula was desirable.

21. It was right that the wording of draft article 14, paragraph 1, dealing with the crime of genocide, should not depart from that of the Convention on the Prevention and Punishment of the Crime of Genocide, which had acquired virtually the force of customary law.

22. The position with respect to *apartheid*, dealt with in paragraph 2, was more difficult, as the International Convention on the Suppression and Punishment of the Crime of *Apartheid* had still not been accepted by all States. Basically, he was in agreement with the phrase in the first alternative of paragraph 2, reading: "the institution of any

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

[15] See footnote 10 above.

[16] See footnote 11 above.

[17] Protocol II relating to the protection of victims of non-international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Treaty Series*, vol. 1125, p. 609).

system of government based on racial, ethnic or religious discrimination". *Apartheid* was a phenomenon that was in the course of disappearing: Namibia was shortly to attain independence as a member of the United Nations, and *apartheid* in South Africa was also expected to disappear. In the circumstances, therefore, a wider form of wording seemed desirable. The Drafting Committee might, however, wish to give close consideration to the matter and reflect on tangible examples of what would be covered by such a broad form of words.

23. Despite the Special Rapporteur's laudable intention to prohibit slavery under paragraph 3, the problem was that, under the law of most nations, slavery was an ordinary crime and punishable as such. It ranked as a crime against humanity only when practised by a State. The Commission would therefore have to decide whether the draft code should cover merely crimes under ordinary law or also crimes in the commission of which the State was involved in some form or other. The prohibition on forced labour was, of course, of long standing in the context of ILO, but the expression "forced labour" had received an extremely broad interpretation in the jurisprudence of that organization that it would be impossible, in his view, to adopt in the context of the draft code.

24. Paragraph 4 introduced three crimes the criminal nature of which had long been acknowledged, and implicitly so under the terms of articles 43 *et seq.* of the Regulations annexed to the 1907 Hague Convention,[18] whereby the occupying Power was obliged to respect the rights of the population. According to modern thinking, the expulsion or forcible transfer of populations from their territory (para. 4 (*a*)) amounted to a breach of the right of a people to self-determination inasmuch as it annihilated the very basis of that right, namely to reside in the land that had always been theirs. He noted in that connection that, while the mass expulsion of the German population from the territories of the East in 1945 was a reaction to the war crimes committed by Hitler's Germany, such a transfer was hard to justify in that better world where disputes were settled peacefully and in accordance with the Charter of the United Nations, particularly Article 33 thereof. The General Assembly had, moreover, constantly condemned all such acts, whether in the Near East, Cyprus, South Africa, Cambodia or elsewhere, and had never been swayed by political considerations. Accordingly, paragraph 4 of draft article 14 commanded his full support.

25. Paragraph 5 raised two questions, the first being who could commit the "inhuman acts" in question. Article 2, para. (11), of the 1954 draft code stated that they could be committed "by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities". That element was lacking in the present draft, which might therefore be construed as extending to any private act. Presumably that was not the Special Rapporteur's intention, and the point should therefore be clarified in the text.

26. The second question concerned the need for the criterion of "mass nature". He endorsed the statement in the Special Rapporteur's report that "where the mass element is absent, an individual act should constitute a link in a chain and be part of a system or plan" (A/CN.4/419, para. 67). That was an important point and should be reflected in the text of the article as well.

27. He further agreed about the need to protect cultural property and historical monuments, but there, too, the Special Rapporteur's purpose did not seem to be clearly expressed in the text, which should be amplified to provide special protection for the cultural, architectural and other heritage.

28. Paragraph 6 involved matters of penal law and must be as specific as possible. It would suffice to refer solely to the "human environment", dispensing with the very general expression "vital human asset", thus establishing a clear parallel between that provision and article 19 of part 1 of the draft articles on State responsibility.[19]

29. Mr. ROUCOUNAS said that he welcomed the Special Rapporteur's seventh report (A/CN.4/419) and the renewed opportunity it provided to discuss the question of war crimes and crimes against humanity. He would confine his comments for the time being to war crimes, an area in which he broadly approved of the Special Rapporteur's approach, while reaffirming the view that the draft code should contain a general definition followed by a list of the crimes concerned. The balance of the draft must be maintained, although he recognized the legitimacy of the Special Rapporteur's arguments in favour of the alternative texts proposed. Accordingly, in the case of war crimes it was desirable to preserve a parallel with crimes against humanity, which were enumerated, and also to emphasize the deterrent aspect of the instrument, even if there was some risk of overlapping, as had already been pointed out.

30. It was not appropriate to use the definition contained in paragraph (*b*) of the first alternative of draft article 13, since the specific references to the 1949 Geneva Conventions and Additional Protocol I would have the effect of limiting the objective of the Commission's work. Moreover, article 1, paragraph 4, of Protocol I had given rise to difficulties of interpretation and widely divergent views were held regarding the definition of an "international armed conflict". It would therefore be preferable to avoid direct references to those instruments.

31. The concept of war crimes involved a further consideration. Admittedly, there was some overlapping between the notion of war crimes and that of grave breaches of humanitarian law, but it should be borne in mind that the concept of a "grave breach" had formed part of international legislation ever since the adoption of the 1949 Conventions. It had been reaffirmed by the 1977 Protocol and it was thus necessary in order to ensure continuity. Moreover, there was reason to think that not all "grave breaches" were covered by the category of crimes known as war crimes.

32. With regard to the laws or customs of war, as referred to in paragraph (*a*) of the first alternative of article 13, one could cite by way of example the specific instance of "superior orders". Surely it would be difficult to assert that that concept, although absent from Additional Protocol I, was not governed by customary law. Plainly the lack of specific texts did not mean that the rules of customary law did not apply.

[18] See footnote 5 above.

[19] *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

33. He could not fail to agree that the seriousness of the offences should be emphasized. The best course would be to use a form of language which reflected the concept of a war crime, yet retain the word "serious" and the expression "armed conflict". In most cases, war crimes involved serious crimes under humanitarian law. The draft code was concerned with crimes against the peace and security of mankind, and the text should make it clear that such crimes were of the most serious nature. That approach would be consistent with the trend of opinion in the international community in recent years.

34. Lastly, the Commission should discuss the question of including the expression "armed conflict", which covered not only international conflicts as referred to in the 1949 Geneva Conventions and in Additional Protocol I—even though the expression was broader in scope as used in the Protocol—but also non-international conflicts, such as civil war. The concept of armed conflicts would need careful consideration if paragraph (*b*) of the second alternative of article 13 were retained, although he himself would favour that version.

35. Mr. ARANGIO-RUIZ said that he preferred the definition of war crimes in the second alternative of draft article 13, which contained a clear reference to international law. Since some countries had, in the past, codified their laws of war, there was a certain ambiguity in the form of language employed in the first alternative. It would be best, however, to specify that the applicable rules of international law included both treaty and custom, and he would suggest adding a qualifier such as "written and unwritten".

36. He agreed that it would be difficult to draw up an exhaustive list of acts constituting war crimes, because of the rapid development of new technologies. Any such list would have to refer to the role of customary law in supplementing written law. As to the degree of gravity of war crimes, both the procedural and the substantive elements must be left intact: a belligerent State which was the victim of such crimes must retain the right to prosecute the offenders. He understood that the Special Rapporteur's purpose in placing the word "serious" in square brackets was to ensure that all violations of the laws of war could be brought into the category of war crimes, as under the existing régime.

37. Mr. RAZAFINDRALAMBO congratulated the Special Rapporteur on the clarity of his seventh report (A/CN.4/419) and on the evident mastery with which the subject-matter had been treated.

38. In draft article 14, the Special Rapporteur had included a list of acts constituting crimes against humanity, but there was no comparable list of war crimes in draft article 13. Certainly, an exhaustive list would be impossible, but an indicative list would none the less restore the balance between the two articles.

39. As for draft article 14, there was little difficulty in defining crimes against humanity, which had already been discussed at the Commission's thirty-eighth session, in 1986.[20] Moreover, some such crimes were already proscribed in separate treaties which listed them in detail. It would therefore suffice to reproduce those lists within the corresponding articles of the draft code, as had already been done in the case of article 12 (Aggression),[21] provisionally adopted at the previous session.

40. In 1986, in his fourth report,[22] the Special Rapporteur had commented that the list of acts enumerated in article 2, paragraph (10), of the 1954 draft code, on genocide, was exhaustive, whereas the list in article 2, paragraph (11), on inhuman acts, was merely illustrative. Thus slavery, for example, had not been referred to separately in the 1986 draft, but was now included in draft article 14 (para. 3), together with three new crimes: expulsion or forcible transfer of populations from their territory; establishment of settlers in an occupied territory; and changes to the demographic composition of a foreign territory (para. 4). The new crimes reflected contemporary developments in international law, and the dividing line between crimes against peace and crimes against humanity had to be further discussed. As to the concept of inhuman acts, he agreed that it could be applied both to offences against the person and to offences against property.

41. Turning to the text of draft article 13, it was indeed necessary to specify the meaning of the term "war", used in the first alternative. The phrase "any international or non-international armed conflict" had the advantage that it was defined both in the 1949 Geneva Conventions and in article 1, paragraph 4, of Additional Protocol I, which also referred to national liberation struggles. The second alternative was more explicit than the first, but did not make it sufficiently clear that non-international conflicts, such as armed struggles by national liberation movements against colonial domination, were also included. Moreover, the words "the international agreements to which the parties to the conflict have subscribed" (para. (*b*)) seemed to exclude non-State entities.

42. As for the gravity of war crimes, he agreed with the Special Rapporteur that the only acts proscribed under internal penal law to be covered by article 13 should be those relating to war crimes. The prohibition of certain methods of waging war, such as the use of nuclear weapons, was already found in international agreements and in customary international law, as well as in General Assembly resolutions. Accordingly, such methods need not be mentioned in the definition of war crimes.

43. Comparing draft article 14 with the non-exhaustive list of crimes against humanity in draft article 12 as submitted in the fourth report,[23] he suggested that the new additions should be emphasized. The enumeration of acts of genocide in paragraph 1, however, largely reproduced the wording of article 2, paragraph (10), of the 1954 draft code in a non-exhaustive manner, which seemed to be an appropriate solution. The same list appeared in article II of the Convention on the Prevention and Punishment of the Crime of Genocide.

44. The definition of acts of *apartheid* contained in the second alternative of paragraph 2 was preferable, for it reproduced the corresponding provisions of article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid.* Adoption of that

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[20] See *Yearbook . . . 1986*, vol. II (Part Two), pp. 43 *et seq.*, paras. 81-102.

[21] *Yearbook . . . 1988*, vol. II (Part Two), pp. 71-72.

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

[23] See footnote 4 above.

alternative would make for consistency in the draft code, since article 12 (Aggression) had been elaborated by the same method. Such lists helped to make the code self-contained, although there had been some opposition to including the crime of *apartheid.*

45. With regard to paragraph 3, he shared the reservations expressed about incorporating forced labour, a very broad concept that was already dealt with in two ILO Conventions.[24] As for paragraph 4, the crimes enumerated therein should be brought together under a single *chapeau* by the Drafting Committee.

46. The "inhuman acts" referred to in paragraph 5 had been taken from article 2, paragraph (11), of the 1954 draft code, with the addition of mass destruction of a population's property. The concept of attacks on property was not new; cultural property was already protected by the normative activities of UNESCO and by article 85, paragraph 4 (*d*), of Additional Protocol I[25] to the 1949 Geneva Conventions. There had been many recent cases of mass destruction of homes for political, racial or religious reasons, and he therefore supported the proposed wording of paragraph 5.

47. He also supported the reference in paragraph 6 to "any serious and intentional harm to a vital human asset, such as the human environment".

48. Finally, he believed that draft articles 13 and 14 should be referred to the Drafting Committee.

49. Mr. BOUTROS-GHALI said that he agreed with those members who favoured a list of war crimes in draft article 13. The chief reason was a non-juridical one: there was a need to educate public opinion, which would be responsive to such a list. Clearly, the list would have to be illustrative, not exhaustive.

50. Mr. ROUCOUNAS said there was no doubt that both the alternative definitions of war crimes in draft article 13 covered acts committed in armed conflicts involving national liberation movements. Indeed, several such movements were parties to instruments of international humanitarian law.

51. Mr. ARANGIO-RUIZ said that Mr. Tomuschat had perhaps been unduly sanguine in his view that the liberation of Namibia would lead South Africa to abandon its policy of *apartheid.* The definition of *apartheid* as a crime against humanity must cover possible cases in the future. Indeed, *apartheid* was already a combination of crimes and offences, and the definition must be comprehensive.

52. Mr. THIAM (Special Rapporteur) said that the words "as practised in southern Africa" had been placed in square brackets in the second alternative of paragraph 2 of draft article 14 for that very reason.

The meeting rose at 1 p.m.

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[24] Convention No. 29 concerning Forced or Compulsory Labour, and Convention No. 105 concerning the Abolition of Forced Labour, adopted by the General Conference of ILO on 28 June 1930 and 25 June 1957, respectively (International Labour Office, *Conventions and Recommendations, 1919-1966* (Geneva, 1966), pp. 155 and 891).

[25] See footnote 11 above.

2097th MEETING

Friday, 5 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/411,[2] A/CN.4/419,[3] A/CN.4/L.431, sect. D, ILC(XLI)/Conf.Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 13 (War crimes) *and*

ARTICLE 14 (Crimes against humanity)[4] (*continued*)

1. Mr. BARSEGOV said that the reports of the Special Rapporteur had the distinction of offering a number of alternatives with regard to the substance of the problems under consideration. Whether one agreed with his conclusions or not, it had to be recognized that the Special Rapporteur had laid the foundations for a fruitful exchange of views.

2. One of the most vital questions the Special Rapporteur had raised in his seventh report (A/CN.4/419) was that of the definition of war crimes and crimes against humanity and their constituent elements. He himself had already stated his preference for the formulation of precise definitions and lists that were as complete as possible. On that point, he shared the opinion of Mr. Roucounas, Mr. Razafindralambo and Mr. Boutros-Ghali (2096th meeting). Those lists could play a very important role in mobilizing opinion and even in prevention. A list could, however, be drawn up only on the basis of specific characteristics and firm and stable classification criteria. Under each heading (crimes against peace, war crimes, crimes against humanity), it would have to be indicated exactly which acts were covered, thus making the code more specific and more effective in political and legal terms. There was no point in having three categories of crimes or trying to classify a particular act under a particular heading unless there was a precise

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] For the texts, see 2096th meeting, para. 2.

definition and an exact indication of what each category covered.

3. With regard to war crimes, the Special Rapporteur proposed two alternatives for draft article 13, the first of which was based on the definitions contained in article 2 common to the 1949 Geneva Conventions and in article 1, paragraph 4, of Additional Protocol I thereto. His own preference was for a solution combining the two alternatives: it would cover both international wars and armed conflicts connected with the liberation of peoples and would mention the violation of the laws or customs of war, in accordance with the approach adopted in paragraph (*b*) of the second alternative.

4. The formulation of an exhaustive list of war crimes was a very difficult task, but it was necessary to move in that direction. In particular, it would be unacceptable to adopt the technique of enumeration for certain categories of crimes but not for others. War crimes had to be dealt with in the same way as the other crimes. The draft code might be weakened if it referred only to the instruments in force. In article 13, it would be advisable to proceed in the same way as in paragraph 1 of article 14, which spelled out the various aspects of genocide, and as in the second alternative of paragraph 2, which listed the acts constituting *apartheid*.

5. Although draft article 14, on crimes against humanity, took the form he would like article 13 to have, it did not contain a general definition of what a crime against humanity was and such a definition was essential for the continuation of the Commission's work. The expression "crime against humanity" had to be defined before any attempt could be made to specify the content of that category of crimes.

6. In Russian as in English and French, the term "humanity" could mean both "mankind" and the moral concept whose antonym was "inhumanity". That terminological ambiguity clearly showed that there was a conceptual problem. In order to remove the ambiguity, it was necessary to go back to the sources. In his report (A/CN.4/419, para. 35), the Special Rapporteur cited the United Nations War Crimes Commission, which had been established in 1943 and had proposed to term such crimes "crimes against humanity" because they had original characteristics which set them apart, in certain aspects, from war crimes. Actually, it was necessary to go back even further to 1915, when, according to the Encyclopedia of Public International Law published by the Max Planck Institute, the expression "crime against humanity" had been used for the first time to describe what the Turkish Government had done to the Armenian people. What had the expression meant at that time? Wishing to intervene in order to put an end to the massacre of the Armenians, the Governments of Russia, France and Great Britain had published identical statements on 13 May 1915 in which the crimes in question had been characterized as "crimes against humanity" in the sense of "crimes against mankind". Originally, the Russian text had referred to "crimes against Christendom and civilization", thereby adding a religious nuance. France and Great Britain, whose empires included many Muslims, had wanted the definition to be broader and, on 24 May 1915, Russia had agreed to amend its text by replacing the words in question by "crimes against humanity and civilization". The idea of "mankind" had thus been accepted.

7. Thirty years later, when the Charter of the Nürnberg Tribunal[5] had been drafted, the Russian expression had been changed, apparently as a result of an imperfect translation. The Tribunal's assessment of the crimes had thus been given a "humanitarian" slant.

8. The results of that confusion could still be seen today in Russian texts: usage was not clear, as shown even in official documents. In any event, "humanity" was taken to mean "mankind". The same contradictions were to be found in other languages, although they were perhaps not so glaring. For example, the report under consideration referred both to the concept of "inhuman acts" (*ibid.*, para. 43) and to the concept of harm to mankind as a whole (*ibid.*, paras. 47 *et seq.*).

9. An exchange of views was therefore essential in order to remove any ambiguity and ensure that the same terms were used in all languages. It was not enough to state that crimes such as genocide, *apartheid* and attacks against a cultural heritage or the environment were "inhuman", even if the acts in question were accompanied by atrocities. In fact, such acts might well not involve atrocities: a culture or an element of the environment could be wiped out and a population group could even be destroyed without massacres or violence, by sophisticated means. There had been examples of mass population movements that had taken place simply because of the prospect of a better future. There was also a risk of confusion because all war crimes were also inhuman. Chemical weapons and nuclear weapons were good illustrations: in their case, how could a distinction be made between a war crime and genocide on the basis of the criterion of "inhumanity"? It had been said that "every crime was inhuman" and nothing was more inhuman than a violation of the laws of war.

10. The Special Rapporteur had stated (*ibid.*, para. 40) that war crimes were committed only in time of war, whereas crimes against humanity could be committed either in time of war or in time of peace and could, moreover, be directed not only against a foreign population, but also against the civilian population of the State concerned. If that criterion was to be used, reference would have to be made to "crimes in time of war" and to "crimes in time of war or of peace".

11. In the 1954 draft code, the Commission had drawn a distinction between genocide and the "inhuman acts" such as murder, persecutions or deportation listed in article 2, paragraph (11). It was obvious that those inhuman acts were also present in genocide, which was therefore an "inhuman" act in itself. There was, however, a difference of principle and intention between genocide and war crimes and the Commission had identified that difference as early as 1954.

12. In addition to those terminological considerations, he wished to put forward a more specifically legal analysis. A crime against humanity was intended to bring about the partial or total elimination, as in the case of genocide, of part of mankind and it therefore had to be amenable to prosecution by all States, even if the internal legislation of the State concerned did not condemn it. That principle had precedents in international law: when pirates had been a threat to the interests of the world as a whole, piracy had been regarded as endangering all of human society. All

[5] See 2096th meeting, footnote 7.

pirates had been declared outlaws in all countries and all vessels had been expected to fight against them. That concept was to be found even in article 14 of the 1958 Convention on the High Seas.[6]

13. It was on the basis of all those elements that the Commission should formulate a definition of crimes against humanity, taken in the sense of crimes against mankind. Since the expression included genocide and *apartheid*, it would have to be indicated that the harm suffered by mankind was the elimination of a population to ensure the supremacy of another group over a given territory. That approach would make it easier to distinguish between the various crimes covered by the topic.

14. The Special Rapporteur proposed to include "any serious and intentional harm to a vital human asset, such as the human environment" as a crime against humanity in paragraph 6 of article 14. In that connection, he pointed out that, under Soviet doctrine, the concept of international security covered ecological security. The inclusion of the proposed provision in the code would undoubtedly help to guarantee that ecological security. It might be advisable to treat such acts as a specific category of ecological crimes, but since they were, at the same time, harmful to the life and health of many population groups and even to mankind as a whole, they might also be regarded as crimes against humanity and be included in the general definition.

15. There were close links between genocide and *apartheid* and the acts referred to in paragraph 4 of article 14, namely expulsion or forcible transfer of populations from their territory; establishment of settlers in an occupied territory; and changes to the demographic composition of a foreign territory. History showed that those acts were also present in genocide, of which they were either the means (colonization or deportation) or the end (changes to the demographic composition of a territory). Since, as shown in the Convention on the Prevention and Punishment of the Crime of Genocide, genocide did not necessarily occur on a foreign territory, but could also be committed within national borders, he proposed that paragraph 4 (*c*) should be amended to read either "changes to the demographic composition of a foreign territory or a territory situated within the borders of the State" or "changes to the demographic composition of the territory of a population group", in order to show clearly that the crime could also be committed within the borders of a State. With regard to deportation, expulsion or forcible transfer of populations from their territory, the judgment of the Nürnberg Tribunal contained clear provisions. It was necessary, however, to think about the distinction to be drawn between transfers of populations carried out under peace settlements and those carried out for the purpose of genocide.

16. Lastly, in the expression "attacks on property", the word "property" appeared to mean both "thing, object of a right of ownership" and "asset". In the case of crimes against humanity, however, the magnitude of the attacks had to be defined. In his report (*ibid.*, para. 48), the Special Rapporteur stated that it could be asked whether such attacks were of a sufficiently serious nature to be treated as crimes against humanity and that the existing instruments did not specifically mention attacks on property. The Special Rapporteur further indicated (*ibid.*, para. 49) that judicial opinion had tended to favour the treatment of mass attacks on property as criminal, giving the example of the collective fine imposed on German Jews in 1938. The problem had been aptly identified in paragraph 5 of article 14, which provided that the mass destruction of property should be regarded as a crime against humanity. That same paragraph referred to inhuman acts committed against any population or against individuals "on social, political, racial, religious or cultural grounds". He himself was of the opinion that, instead of the term "grounds", which had subjective elements, it would be preferable to use the word "aims" or the word "purposes". Above all, reference had to be made to the links between attacks on property and genocide by taking account of what happened in practice when a people was subjected to genocide or *apartheid*, deprived of its land and dwellings and compelled to emigrate, when changes were made in its demographic composition and when a national group was thus eliminated.

17. He also thought that the destruction of historical monuments embodying the memory of an entire population should be regarded as a crime against humanity, in the same manner as *apartheid* and genocide. That might be a special category of crimes, namely crimes against civilization, but there were, in that case as well, close links between those crimes and the destruction of ethnic and religious groups: they were all crimes against humanity, in other words against all of mankind.

18. Mr. CALERO RODRIGUES noted that draft articles 13 and 14 as submitted by the Special Rapporteur in his seventh report (A/CN.4/419) were not altogether new, since they reproduced, with some changes, articles 13 and 12, respectively, proposed in 1986 in the fourth report.[7]

19. For draft article 13, to which he would confine his remarks, two alternatives were proposed, in both of which the adjective "serious" qualifying the word "violation" appeared between square brackets, although that had not been the case in draft article 13 as submitted in the fourth report. In his view, it was essential to retain that adjective to ensure that minor violations of the rules of armed conflict did not fall within the ambit of the code. In that connection, he would remind members that the Commission had taken a decision of principle on the fact that crimes against the peace and security of mankind should be the most serious offences. Also, the 1949 Geneva Conventions[8] made a distinction between grave breaches and other acts contrary to their provisions, each category having its own legal consequences. Additional Protocol I[9] to those Conventions, which repeated that distinction, further provided in article 85, paragraph 5, that "without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes".

20. The Special Rapporteur's examination of the gravity of war crimes and the distinction between war crimes and grave breaches (*ibid.*, paras. 15-27) was interesting, but inconclusive, and sometimes focused on points that did not touch upon the core of the problem. Was it necessary, for instance, to expand the arguments to prove that, while any

[6] United Nations, *Treaty Series*, vol. 450, p. 11.

[7] See 2096th meeting, footnote 4.

[8] *Ibid.*, footnote 10.

[9] *Ibid.*, footnote 11.

grave breach of humanitarian law constituted a war crime, the converse was not true? The question was rather whether a breach which was not grave could be regarded as a war crime. The Special Rapporteur, without developing the point, seemed to arrive at the right conclusion, since he stated (*ibid.*, para. 22) that it was "hard to imagine how acts which are not highly serious could be considered as crimes against the peace and security of mankind". He agreed with that view and favoured the deletion of the square brackets in article 13, whichever alternative was adopted.

21. While draft article 13 as submitted in 1986 had included an indicative list of acts constituting war crimes, the Special Rapporteur was content in his seventh report with a general definition, an approach he himself approved of. Even those members of the Commission who had expressed themselves at the present session in favour of a list admitted that it could not be exhaustive. A purely indicative list would, however, be of little use and in any event devoid of legal purpose, since it would not make it possible to achieve the degree of precision required in criminal law. He therefore trusted that, instead of embarking on an impossible task, the Commission would be content with a general definition.

22. Leaving aside some questions of drafting that could be settled by the Drafting Committee, he preferred the second of the two alternatives proposed for article 13. The traditional expression "laws or customs of war", which appeared in the first alternative, was no longer satisfactory, since, with developments in international law, the concept of "war" now extended to situations that were not wars in the traditional sense of the term. Consequently, that expression could now be understood only if it was accompanied by an interpretation that relied on a number of international instruments. The expression "armed conflict", on the other hand, was clear and precise and required no explanation. The definition of war crimes as violations of the "rules of international law applicable in armed conflict" covered both conventional (written) law and customary (unwritten) law, as well as all types of armed conflict, to the extent that international law was applicable to them. If the second alternative were adopted, the need for the distinction referred to by Mr. Roucounas (2096th meeting) between international and non-international armed conflicts, though interesting, would disappear. In that event, if the rules of international law were applicable to an armed conflict, any conduct which seriously violated those rules constituted a war crime whether the conflict was international or not.

23. If the first alternative, under which war crimes were defined as violations of the "laws or customs of war", were adopted, the interpretation to be given to the term "war" would have to be specified. The explanations given in paragraph (*b*) of the first alternative were insufficient, however, and the references made would have to be extended to Additional Protocol II[10] to the Geneva Conventions and possibly also to article 3 common to the four Conventions, since it was there that the provisions relating to non-international conflicts were to be found. Protocol I related to the protection of victims of international armed conflicts or, in other words, to the situations referred to in article 2 common to the Geneva Conventions, but also to armed conflicts in which peoples were fighting against colonial domination and alien occupation or against racist régimes in the exercise of their right to self-determination (art. 1, para. 4)—conflicts which had been "internationalized" by that Protocol. Protocol II, which related to the protection of victims of non-international armed conflicts, developed and supplemented article 3 common to the Geneva Conventions and applied to armed conflicts that took place in the territory of a contracting party, provided that such conflicts involved the armed forces of that party and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (art. 1, para. 1). It did not, however, apply to situations of internal disturbances, such as riots and acts of violence, which were not considered to be armed conflicts (art. 1, para. 2).

24. If, however, the definition proposed in the second alternative were adopted, there would be no need for an explanation. Even paragraph (*b*) of that alternative did not seem necessary, since it was self-evident that the "rules of international law applicable in armed conflict" were those that the parties must respect either because they had expressly agreed to them or because those rules were part of general international law.

25. For the reasons he had explained, he was in favour of referring the second alternative of article 13 to the Drafting Committee.

26. Mr. PAWLAK said that, since war and aggression had been outlawed by the Charter of the United Nations, which prohibited the threat or use of force against the territorial integrity or political independence of any State (art. 2, para. 4) except in the case of legitimate individual or collective self-defence (art. 51), it might now seem that the rules governing the conduct of war were out of place and that the Commission's efforts to define war crimes were of purely academic interest. That was certainly not the case, however, for it was an acknowledged fact that the prohibition of force did not suffice to prevent war. Once a war started, therefore, it was important that it should be conducted in conformity with the laws of war, the most important provisions of which were those relating to humanitarian questions. It was also important that those rules should be the same in the case of conflicts between States and in the case of civil war, since the means employed in both cases were identical or almost identical, and that they should apply equally to all the parties to the conflict, in other words to the aggressor and to its victims alike.

27. Furthermore, in defining war crimes, account should be taken of the situation in the contemporary world where wars between States increasingly gave way to local or regional conflicts involving a combination of internal and external military struggles, as in the Indochinese wars or, again, the conflicts in some regions of Africa and Central America. The term "armed conflict", which was broader than the term "war", was therefore preferable to the latter.

28. As one who favoured a general and broad definition of war crimes, covering crimes committed in all armed conflicts within the meaning of the 1949 Geneva Conventions and Additional Protocol I thereto, he preferred the second alternative of draft article 13 submitted by the

[10] *Ibid.*, footnote 17.

Special Rapporteur, subject to some drafting improvements which the Drafting Committee could deal with. He would, however, draw the Special Rapporteur's attention to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which the Special Rapporteur had not quoted in his seventh report (A/CN.4/419) and which might usefully be consulted in order to solve certain problems of definition.

29. It was important to bear in mind that the parties to an armed conflict did not have the right to use all means available. Under the famous Martens clause (*ibid.*, para. 5), even in the absence of specific provisions, civilians and combatants remained under the protection and authority of the principles of international law, as stated in article 1, paragraph 2, of Additional Protocol I. Also, the means used in an armed conflict should be confined to the main purpose of the war, which was to defeat the enemy, from which it was evident that the populations of the parties to the conflict should be especially protected and that crimes against civilians were the most serious.

30. In conclusion, he was in favour of using the term "armed conflict", which should be interpreted to include internal conflicts, but not internal terrorism or brigandage. As to the gravity of war crimes, he did not consider it necessary to use the adjective "serious" to qualify violations of the laws or customs of war or the rules applicable in armed conflict: it would be up to the courts to determine the gravity of the crimes committed.

31. Turning to draft article 14, on crimes against humanity, he said that in many respects he shared Mr. Barsegov's views on the meaning of the term "humanity". He also supported the general approach to the subject taken by the Special Rapporteur in his seventh report, as well as the idea expressed in paragraph 32 thereof and further developed in paragraphs 43-46 and 50. For the reasons explained by the Special Rapporteur and in the light of Poland's experience as a country occupied for almost six years by Nazi Germany, he took the view that the concept of inhuman acts could apply to offences against the person and to offences against property. The world must never again witness the humiliations, confiscations and destruction that had been visited upon Poland.

32. Of the two alternatives proposed for paragraph 2, he preferred the second. "Forced labour", as referred to in paragraph 3, could be made the subject of a separate paragraph.

33. He had two comments to make with regard to paragraph 4. First, from the legal point of view, the expression "their territory" was vague: did it mean the "occupied territory" or the "territory of their State or country", or indeed the "land" of those populations? He would be in favour of using the term "occupied territory". Secondly, the example given by Mr. Tomuschat (2096th meeting) in support of the expression "expulsion of populations" was out of place. If he had understood correctly, Mr. Tomuschat had referred to "the mass expulsion of the German population from the territories of the East" as a violation of the 1907 Hague Convention. In fact, however, the Potsdam Agreement signed on 2 August 1945 by Stalin, Truman and Attlee had referred not to "mass expulsion" or to the "territories of the East", but to "the transfer . . . of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary". In the case of Poland, the population transfer had been part of a peaceful solution to the territorial question arising out of the decisions taken by the Allies with regard to the delimitation of the German-Polish border. Under the Potsdam Agreement and pursuant to the decisions taken by the Allies by agreement with the Polish authorities, the entire German population of Poland had been systematically transferred to the Soviet and British Zones. In 1946, 1,632,000 Germans had left Poland; in 1947, 538,000; and, in 1948, 42,000. That population transfer, though painful, had been carried out under an international agreement and could therefore not be regarded as a crime within the meaning of the draft code.

34. Mr. BOUTROS-GHALI said that, of the two alternatives proposed for paragraph 2 of draft article 14, he preferred the second, which was in keeping with what he had said at the previous meeting with regard to the persuasive function of an illustrative list. He nevertheless thought that the words in square brackets, namely "as practised in southern Africa", should be deleted for two reasons. The first was that *apartheid* might one day disappear from that part of the world. The second was that there was a tribal or customary "third-world *apartheid*", which differed from institutionalized *apartheid* and in which one ethnic group traditionally regarded itself as being superior to another and arrogated to itself rights over the other group on that basis. That form of *apartheid* became institutional *apartheid* when the "inferior" group was prevented from participating in political life or was subjected to a *numerus clausus* for the purpose of enrolment in schools and universities or to restrictions on its economic activity—to say nothing of cases of outright physical elimination. The constitutions of such countries no doubt proclaimed the equality of all citizens and the provisions of their legislation were probably impeccable: the gravity of some of the situations which had occurred in the past year none the less justified the concern he had expressed.

35. Those considerations prompted him to ask two questions. Why was so little importance attached to "customary *apartheid*"? And what suggestion could be made to the Special Rapporteur so that he would take account of that phenomenon?

36. He believed that the answer to the first question might perhaps lie in the justified indignation occasioned by the *apartheid* practised in South Africa, which differentiated between Whites, Blacks and Coloureds (unlike customary *apartheid*, which was based on time-honoured customs and established distinctions between the members of the same race); and in the fear that, if the countries which practised customary *apartheid* and were often the first to denounce South Africa were singled out, the struggle against South African *apartheid* might be weakened.

37. With regard to the second question, he said that, although the second alternative of paragraph 2 proposed by the Special Rapporteur was very explicit, it did not draw attention to *apartheid's* customary substructure. He therefore suggested that the scope of the second alternative should be expanded by including in it a reference to the tribal customs or customary law which lent legitimacy to certain practices. Even if *apartheid* was successfully eliminated in South Africa, there were no grounds for hoping that it would not continue in other forms elsewhere.

38. Mr. MAHIOU, referring to draft article 13, said that the choice between a general definition and a list of war crimes posed a tricky problem. A general definition would allow the code to be adapted to future developments and would obviate the need for a discussion of the crimes to be included in a list. He was nevertheless reluctant to endorse that solution. As an argument in its favour, it had been stated that the topic under consideration was subject to change and that new conventions might categorize as war crimes acts which were not currently so regarded. That argument was not decisive. It would in fact be sufficient to formulate article 13 in such a way as to leave the door open to future developments. That was more a problem of drafting than of principle, for, if there was a new convention prohibiting a particular type of conduct, violations of that convention would fall within the scope of the code, since the second alternative proposed by the Special Rapporteur referred to "any violation of the rules of international law applicable in armed conflict". That was thus not a decisive argument against drawing up a list. It might, however, be difficult to agree on a list of war crimes. Would an indicative list be enough in criminal law or must all the crimes be enumerated? It would be best to draw up an exhaustive list, but unfortunately such an exercise did not seem feasible.

39. In those circumstances, why not revert to the method of indicative listing and use the words "in particular"? That had been the Commission's approach in 1950 when it had had the task of codifying the Nürnberg Principles:[11] according to Principle VI (*b*), war crimes were "Violations of the laws or customs of war which include, but are not limited to . . . ". The Commission could therefore list the crimes which were not controversial but leave the list open, as it had in paragraph 4 of article 12 (Aggression),[12] provisionally adopted at the previous session, which read: "[In particular] any of the following acts . . . constitutes an act of aggression . . . ". The presence of square brackets in that provision no doubt reflected considerations of a different kind: in article 12, the brackets could be explained by the fact that the General Assembly had already adopted the Definition of Aggression,[13] that it was for other bodies, such as the Security Council, to supplement that Definition and that there was no question of giving the judge the authority to characterize as aggression acts other than those listed in the article. The fact remained that, in that case, the Commission had agreed to entrust the judge with the task of characterizing certain acts or types of conduct in accordance with the conventions in force. Perhaps the Drafting Committee should decide what the best approach would be for article 13, but, in his view, the possibility of a list was not without legal justification.

40. Should account be taken of all violations of the rules governing armed conflicts or only of the most serious ones? He inclined towards the latter proposition, which was based on a distinction between war crimes, grave breaches and serious violations that gave rise both to a problem of terminology and to a problem of substance. In his seventh report (A/CN.4/419, paras. 25-26), when referring to the links between war crimes and grave breaches, the Special Rapporteur rightly stated that the concept of a war crime was broader and included grave breaches. However, the concepts of violation and breach, which the Special Rapporteur analysed, were not always very clear, even if one referred to the 1949 Geneva Conventions and the Additional Protocols thereto. The two concepts were often used synonymously in those instruments and there might well be only one article in Additional Protocol I[14] in which the two terms could be said to be different: that was article 90, paragraph 2 (*c*) (i), which related to the International Fact-Finding Commission and stated that that body was competent to "inquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol". However, the question was whether the conjunction "or" introduced a distinction or reflected synonymity. The matter was open to discussion and the commentaries did not provide any clarification. They included only one reference to a publicist, Erich Kussbach, the author of a study on the International Fact-Finding Commission, who had drawn the following distinction: a serious violation would entail responsibility on the part of a party to the conflict, but would not entail the international responsibility of the individual, which would arise only as a result of a grave breach.[15] Characterization as a serious violation or as a grave breach would then be decisive.

41. Those were matters to be considered by the Special Rapporteur and by the other members of the Commission, who would be called upon to adopt a clear-cut position. He personally would not be opposed to a general definition of war crimes, followed by a non-exhaustive list of acts and conduct considered to be war crimes, which would be introduced by the words "in particular" or by the formula "which include, but are not limited to", as in the above-mentioned Principle VI (*b*) of the Nürnberg Principles. It seemed to him that, if the Commission retained the criterion of gravity to determine whether certain acts or types of conduct constituted war crimes and if it wished to set those crimes apart by not taking account of misdemeanours and minor offences, it would, in practical terms, have to take that option to its logical conclusion by drawing up a list of those crimes, even a non-exhaustive one. Moreover, as the Special Rapporteur had pointed out, Additional Protocol I contained a list—which was not very long and which was limitative—of acts or conduct against certain persons or property which were considered to be grave breaches. That did not mean that the code must confine itself to the acts and conduct listed in the 1949 Geneva Conventions and in Additional Protocol I, although such acts and conduct might serve as a basis for a non-exhaustive list of acts and conduct to be characterized as war crimes. A further argument in favour of a list stemming from the concern for harmonization was that article 12, already provisionally adopted by the Commission, contained a non-exhaustive list of acts regarded as acts of aggression and that the text proposed by the Special Rapporteur for article 14 also contained a list—apparently limitative—of acts and conduct regarded as being crimes against humanity.

[11] *Ibid.*, footnote 14.

[12] *Yearbook . . . 1988*, vol. II (Part Two), p. 72.

[13] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[14] See 2096th meeting, footnote 11.

[15] E. Kussbach, "Commission internationale d'établissement des faits en droit international humanitaire", *The Military Law and Law of War Review* (Brussels), vol. XX, Nos. 1-2 (1981), p. 101.

42. Turning to the question of the terms to be used in draft article 13, he noted that the Special Rapporteur was not certain whether the expression "laws or customs of war" was appropriate and that, so far, the members of the Commission were divided on that point. The expression was, of course, commonly used and was to be found in many international conventions and in the internal law of many countries. However, a point to be borne in mind was that most of those texts pre-dated Additional Protocol I of 1977, which used the expression "rules of international law applicable in armed conflict" (art. 2 (*b*)). That had become the standard formula. It was the one that should be used now, especially since most of the law of armed conflict had been codified in a variety of conventions and it would be advisable to rely on treaty law, Additional Protocol I representing the most recent consensus among States in that field. There seemed little point in reopening the debate on that point.

43. For all those reasons, he believed that the second alternative of draft article 13 should be referred to the Drafting Committee, which should be requested to introduce the following amendments: in paragraph (*a*), the general definition of war crimes should be followed by a list, possibly a non-exhaustive one, of the main acts and conduct considered to be war crimes, based on the 1949 Geneva Conventions and Additional Protocol I; paragraph (*b*) should be retained, perhaps with a few drafting changes; and a new paragraph (*c*) should be added containing a definition of the term "armed conflict", which would be based in substance on paragraph (*b*) of the first alternative and could read: "The term 'armed conflict' is understood to have the meaning defined in the Geneva Conventions . . . ", so that the two important expressions—"rules of international law applicable in armed conflict" and "armed conflict"—would be clearly defined.

44. With regard to draft article 14, he said that, since he had already made general comments on the substance of that provision at the thirty-eighth session, in 1986, he would refer only to the acts which the Special Rapporteur listed and proposed to characterize as crimes against humanity.

45. He had been persuaded by the Special Rapporteur's explanations and thus agreed that the crime of genocide should be listed first, its definition being taken from the Convention on the Prevention and Punishment of the Crime of Genocide.

46. As for paragraph 2, he agreed with the point made by Mr. Boutros-Ghali that *apartheid* should not be restricted to the policies and practices prevailing in South Africa, since other forms of *apartheid* might already exist or might exist in the future. Moreover, the second alternative proposed by the Special Rapporteur, which reproduced the definition in the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, contained a number of elements that could apply both to *apartheid* as practised in South Africa and to the forms of *apartheid* that existed or might exist in other societies or in other States. The words in square brackets in that alternative should therefore be deleted. There was, of course, a drafting problem, since a definition of *apartheid* already existed in an international instrument; it was for the Commission to decide whether and how it could be improved.

47. He had some doubts about the words "Slavery and all other forms of bondage, including forced labour", in paragraph 3, because the terms "bondage" and "forced labour" were imprecise and could apply to acts which would not necessarily have a place in the draft code. The wording of that paragraph should therefore be revised with a view to making it more restrictive.

48. In paragraph 4, the Special Rapporteur had rightly taken account of the discussions held in the Commission and in the Sixth Committee of the General Assembly and had attempted to incorporate in the draft code certain extortionate acts that were only too likely to occur. It might be possible to combine in a single provision the acts and conduct listed in subparagraphs (*a*), (*b*) and (*c*); that was a problem that could be referred to the Drafting Committee.

49. With regard to paragraph 5, he noted that the Special Rapporteur had basically reproduced the corresponding provision of the 1954 draft code (art. 2, para. (11)). He welcomed the inclusion of a new element, namely the "mass destruction of their property".

50. The proposed text of paragraph 6 was an improvement on the corresponding text submitted in 1986[16] because it introduced the crucial idea of intent and it was important that a distinction should be made between accidental and deliberate serious harm to the environment. The provision should, however, be drafted more vigorously and precisely and should be based even more closely on the wording of draft article 19 of part 1 of the draft articles on State responsibility.[17] It should refer expressly only to the human environment as the common heritage of mankind, since that was, after all, the point at issue.

51. In conclusion, he proposed that draft articles 13 and 14 should be referred to the Drafting Committee.

52. Mr. ARANGIO-RUIZ, noting that several members of the Commission who had already spoken on draft article 13 were in favour of the idea of introducing the concept of "gravity", said that he wished to expand on the brief comments he had made on that point at the previous meeting.

53. The idea was quite commendable and he could appreciate that, in principle, the code, which was meant to deal with crimes against the peace and security of mankind, should cover only the most serious ones. It should, however, be pointed out that the Commission had adopted three categories of crimes (crimes against peace, war crimes and crimes against humanity), as referred to in the 1945 London Agreement[18] which had served as the basis for the war crimes trials held at Nürnberg and elsewhere, and that the concept of gravity was not to be found in the international law which had, for a century or more, governed the punishment of war crimes. Under the rules of international law in force, a belligerent State which had apprehended a member of the enemy's armed forces for a violation of some rule of the laws of war—whether on land, at sea or in the air—was entitled to try him, even if the violation was a minor one; the punishment would, of course, be proportionate to the violation committed. He was not

[16] Paragraph 4 of draft article 12 as submitted in the fourth report (see 2096th meeting, footnote 4).

[17] See 2096th meeting, footnote 19.

[18] *Ibid.*, footnote 7.

necessarily arguing that minor violations should be included in the code, but he did think that the Commission, and the Drafting Committee in particular, should avoid undermining the effect, if not the existence, of the rules of the law of war, which were part of general international law, especially if the word "war" was taken to apply to all kinds of hostilities.

54. The CHAIRMAN said that, although he understood Mr. Arangio-Ruiz's concern, no one had proposed any change in the usual meaning of the term "war crime" or in the régime applicable to war crimes. The Commission was dealing only with "war crimes" within the meaning of the draft code.

55. Mr. KOROMA said that he agreed with Mr. Arangio-Ruiz. It was, of course, understood that the draft code would generally cover only the most serious acts. In the case of war crimes in particular, however, a régime applicable to them existed and there was no need to know whether a violation of the laws of war was serious to determine whether or not it constituted a war crime. The element of gravity could, if necessary, come into play at the stage of characterization, but certainly not in the definition. Moreover, the inclusion of the concept of gravity in the definition would mean introducing some degree of subjectivity in the application of the code by making the prosecutor—the belligerent State, in the present case—the judge. Although the prosecutor would institute proceedings for a violation of the laws of war, the judge would determine how serious the violation had been.

56. He supported Mr. Barsegov's analysis of the expression "crime against humanity", which was to be understood in the sense of "a crime against the human race", a crime against values that were shared by all of mankind.

57. Lastly, he agreed with the proposal originally made by Mr. Roucounas (2096th meeting) that the definition of war crimes in draft article 13 should be supplemented by an indicative list.

58. Mr. CALERO RODRIGUES drew Mr. Koroma's attention to a case in which a violation of no particular seriousness might be considered a war crime within the meaning of the draft code. Articles 26 and 27 of Additional Protocol I to the 1949 Geneva Conventions contained a definition of the circumstances in which medical aircraft operated and, according to article 28, paragraph 4: "While carrying out the flights referred to in articles 26 and 27, medical aircraft shall not, except by prior agreement with the adverse Party, be used to search for the wounded, sick and shipwrecked." If the commander of a medical aircraft were to ignore those rules and decide to go in search of the wounded, sick or shipwrecked, would it be said that he had committed a war crime?

59. Mr. ARANGIO-RUIZ said that his concern was not whether the case cited by Mr. Calero Rodrigues should or should not be covered by the draft code—although he was inclined to say that it should—but that, if minor violations were excluded from the code, the Commission might be concealing the fact that such violations were none the less infringements of the laws of war and that they were as such covered by existing international law. It would be for the Drafting Committee to deal with that problem and remove any ambiguity.

The meeting rose at 1 p.m.

2098th MEETING

Tuesday, 9 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/411,[2] A/CN.4/419,[3] A/CN.4/L.431, sect. D, ILC(XLI)/Conf.Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 13 (War crimes) *and*
ARTICLE 14 (Crimes against humanity)[4] (*continued*)

1. Mr. REUTER, commenting on draft article 13, said he preferred the second alternative and thought that the necessary gravity of the acts to be classified as war crimes must be stated in very clear terms, indeed more clearly perhaps than in either of the alternatives proposed by the Special Rapporteur. He was, however, absolutely opposed to the idea of including in the draft code a list of acts constituting war crimes.

2. The Commission was dealing with very serious issues, which raised the question as to what its role was. Some of the draft articles were still unacceptable and could endanger the entire draft. The Commission's task was not merely to devise some functional mechanism for the prosecution of war crimes, such as an international criminal court. Nor was it to define the circumstances in which States were bound either to try or to extradite offenders. (In that connection, he would point out that the attitude of Governments towards the idea of an international criminal jurisdiction was perhaps more flexible than might appear.) For the majority of Governments, the Commission's task was a broader one, namely to give attention to the substantive rules relating to war crimes and to define new war crimes.

3. Did the Commission intend, in the draft code, to impose on States the obligation to accept Additional Protocols I and II to the 1949 Geneva Conventions? According to

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] For the texts, see 2096th meeting, para. 2.

recent information, 166 States had ratified the Conventions, but by no means all of them had ratified the Protocols. Some States had refused to do so, and had given their reasons to representatives of ICRC, reasons which had nothing to do with inertia or laziness. He could therefore not agree to the Commission adopting a text implying that one or other of the Protocols had created rules of customary law. The Commission could stipulate that any State which accepted the draft code would be committed to become a party to the Protocols; but States could not be bound without their consent. He for one firmly rejected any notion of basing the code on recent conventions or General Assembly decisions, on the pretext that they enunciated rules of customary international law. Another difficulty, in connection with the second alternative of draft article 13, was that States which were not parties to the two Protocols but which accepted the code would not have exactly the same obligations as States parties. Regrettably, the Commission had no power to remedy those drawbacks.

4. He wondered whether the gravity of war crimes should not be emphasized by a reference to all the relevant treaty rules in force and also to internal law: in every country there was a class of crimes designated as serious. Guidance would have to be given in that regard to courts that would be called upon to decide on requests for extradition: the situation might arise in which a State requested extradition of an offender for a crime that did not fall into the same category of crimes in the requested State.

5. His objection to including a list of acts constituting war crimes stemmed from the Commission's function, which was to act on behalf of Governments. It was not, like the Sixth Committee or the General Assembly, a political organ free to make declarations on the content of international crimes. Nor was it the Commission's task to respond to public opinion, but to undertake a substantive codification of war crimes and perhaps to define new ones.

6. With regard to draft article 14, he thought that crimes against humanity should not encompass the "forcible transfer of populations from their territory" (para. 4 (*a*)). In view of the appalling incidents of slaughter that took place in the world, States could not be prohibited from transferring populations, or agreeing to such transfers, in order to save them from certain death.

7. On the question of *apartheid*, it had already been pointed out that some States did not accept the existing convention; hence the Commission must set out the nature of the crime in detail in the draft code. The whole question of minority rights was, in fact, highly delicate: the Council of Europe had wisely avoided it, and the United Nations itself had not tackled it head-on. Once again, the inherent difficulty in the draft was that no adequate list of crimes could be devised. He would like the Commission not to be content with merely itemizing crimes, especially when it came to those that were more or less new, but ill-defined. It could not deal with all crimes, for a complete codification of crimes against humanity could easily take 25 or 30 years. But it could deal with some of them, particularly those on which feelings were strongest, such as *apartheid*; as for the rest, it could list in its report the questions on which it still had to work.

8. Another question that arose was that of the first use of nuclear weapons, which must be covered by the code; but what of chemical weapons and action contributing to acts of mass destruction? It would be extremely difficult to attempt an exhaustive codification, but resorting to a simple formula was not the answer. The Commission should closely study criminal intent, a concept well known in all systems of penal law which might offer some solution to the problem of definition.

9. In summary, his objection to lists of crimes was essentially methodological: proper codification was necessary, but it would take too long. For the topic of succession of States, for instance, the Commission had begun work in 1963, but had not completed its draft until the process of decolonization was well advanced. In its report on draft articles 13 and 14, the Commission should explain the difficulties encountered and endeavour to find out what was wanted. He fully realized, moreover, that the Special Rapporteur was seeking the views of members on the subject, and he wished to pay tribute to his efforts to reconcile divergent opinions.

10. Mr. YANKOV said that he would confine his remarks to draft article 13 and that, on a number of points, his views differed from those so ably expounded by Mr. Reuter.

11. With regard to the scope and content of the expression "war crimes", two main trends had emerged in the course of the discussion: one favoured a general definition, and the other favoured a list of specific acts constituting war crimes. In that connection, it was worth noting an important development in treaty-making techniques. A few decades ago, it had been usual to include in international treaties an article entitled "Definitions", a provision nowadays replaced by one on "Use of terms". That change had been brought about by a realization of the perils involved in the process of definition.

12. Both the alternative texts proposed for article 13 contained a general definition of war crimes, which was something of a new approach, for the second alternative of the article as submitted by the Special Rapporteur in his fourth report in 1986 had contained an enumeration of acts constituting war crimes (see para. 15 below). The arguments now advanced by the Special Rapporteur in his seventh report were based on the belief that the law relating to war crimes was not static and had constantly to be adapted to the needs of a changing world, and that in many cases treaties did no more than express and define the principles of existing law (A/CN.4/419, para. 9); and on the fact that many distinguished authors had come to the conclusion that an exhaustive list of war crimes was impossible (*ibid.*, para. 10).

13. It was perhaps true that no list of war crimes could adequately reflect the dynamics of the applicable law, but the same could be said of crimes against peace and crimes against humanity. Yet article 12 (Aggression),[5] provisionally adopted by the Commission at the previous session, and draft article 14, on crimes against humanity, now proposed by the Special Rapporteur followed the method of enumerating the acts in question. In its work on elaborating a code of crimes against the peace and security of mankind, the Commission had often been urged to follow, as far as possible, the method of codification used in penal law, where determination of the individual violations of the law was of paramount importance. That enabled the competent court to establish the extent to which a particular course of

[5] *Yearbook . . . 1988*, vol. II (Part Two), pp. 71-72.

conduct was a punishable offence. The same general requirement should apply even more in the case of wrongful acts under international law. In his view, before a definite decision was reached on the scope of the provisions relating to war crimes, it was necessary to determine whether there were sufficient grounds for trying to draw up a list of acts constituting violations of the laws and customs of war or armed conflict and whether it was possible to combine the enumerative method with a general definition, in order to arrive at a comprehensive legal concept of war crimes.

14. The answer to the first question would require a comprehensive survey of State practice as evidenced by international treaties and case-law prior to and after the 1907 Hague Convention, the 1949 Geneva Conventions and the 1977 Additional Protocols thereto, and other relevant instruments. As was well known, article 6 (*b*) of the Charter of the Nürnberg Tribunal[6] listed a series of important elements of war crimes, namely violations of the laws or customs of war, including but not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. The Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[7] had been reaffirmed by the Commission in 1950.

15. In the second alternative of draft article 13 as submitted in his fourth report in 1986,[8] the Special Rapporteur had adopted the enumerative method and proposed the following list of acts constituting war crimes:

. . .

(i) serious attacks on persons and property, including intentional homicide, torture, inhuman treatment, including biological experiments, the intentional infliction of great suffering or of serious harm to physical integrity or health, and the destruction or appropriation of property not justified by military necessity and effected on a large scale in an unlawful or arbitrary manner;

(ii) the unlawful use of weapons, and particularly of weapons which by their nature strike indiscriminately at military and non-military targets, of weapons with uncontrollable effects and of weapons of mass destruction (in particular first use of nuclear weapons).

16. For his own part, he thought that the prohibition of weapons of mass destruction should be absolute and should not apply only to the first use of such weapons. The serious violations he had just cited could form the first part of the enumeration of war crimes. In order to ensure the comprehensive character of the expression "war crimes" for the purposes of the draft code, the list could then be followed by a general provision stating that the expression encompassed all other serious violations of the laws or customs of war, of the rules of international law applicable in armed conflict to which the parties to the conflict had subscribed, and of the generally recognized principles and rules of such law. That formulation would combine a specific indication of individual acts with a general concept of a war crime. It would bring closer together the traditional notion of war and the contemporary phenomenon of armed conflict, which could include national liberation struggles and civil war. In addition, the test of seriousness or gravity was an essential element of the concept of a war crime and the qualification "serious" should form part of any formulation adopted.

17. In conclusion, when it came to refer draft article 13 to the Drafting Committee, the Commission should express a preference for—or at least indicate the possibility of—a text containing a list of serious violations combined with a general definition to cover any other acts, the idea being to allow for possible solutions to the institutional problem of a court—whether a national court or an *ad hoc* or permanent international tribunal.

18. Mr. SEPÚLVEDA GUTIÉRREZ, referring to draft article 14, said that he favoured a list of crimes against humanity along the lines of that set out by the Special Rapporteur in his excellent seventh report (A/CN.4/419). He also considered it necessary to include somewhere in the draft a definition of the term "humanity", otherwise it would be difficult to understand clearly the concept of "crimes against humanity".

19. It was entirely appropriate to mention genocide, which was correctly defined in paragraph 1. Subparagraphs (i) to (v) set out in precise terms the various acts constituting that crime, which were in fact those to which world public opinion attached most importance.

20. Paragraph 2, on *apartheid*, should be retained, because it dealt with a phenomenon which was unfortunately on the increase. Hence it was essential to leave no loophole with regard to the definition and suppression of the crime of *apartheid*. Nevertheless, the words "as practised in southern Africa", placed between square brackets in the second alternative, could be deleted for obvious political reasons and also because that type of exemplification was not in conformity with good drafting technique.

21. Paragraph 3, concerning "slavery and all other forms of bondage, including forced labour", was not altogether satisfactory. The reference to "slavery" should, of course, be retained, but the formula "all other forms of bondage" was imprecise. In the first place, it appeared to belittle the seriousness of slavery, and secondly, such a form of words did not give any indication of the content of the concept of "forms of bondage". The concept of "forced labour" should be retained, subject, however, to a clear identification of the type of forced labour involved, namely a kind different from that covered by the relevant ILO Conventions.[9]

22. The words "from their territory", in paragraph 4 (*a*), should be retained, for they contained no ambiguity. While the wording of paragraph 5 was acceptable, the commentary should none the less explain what was meant by the concept of "inhuman acts". In view of its importance, paragraph 6 should be drafted with greater precision and it was necessary to establish some connection with the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law.

23. Lastly, a paragraph should be added to article 14 to deal with damage to or appropriation of items forming part of the cultural heritage of mankind. UNESCO had done

[6] See 2096th meeting, footnote 7.

[7] *Ibid.*, footnote 14.

[8] *Ibid.*, footnote 4.

[9] *Ibid.*, footnote 24.

important work to protect that heritage, which included archaeological treasures and even entire villages and towns. The destruction of such property was a crime against the very history of humanity. Any grave, intentional attack against it for political, racial or religious motives should fall within the scope of crimes against humanity.

24. In his view, draft article 14 could be referred to the Drafting Committee.

25. Mr. SHI said that the Special Rapporteur's lucid and scholarly seventh report (A/CN.4/419) would serve as a useful complement to the relevant parts of his fourth report, submitted in 1986.[10]

26. Although the Commission had apparently initially been divided on the unity or otherwise of the concept of crimes against the peace and security of mankind, it had after lengthy debate decided to subdivide them into crimes against peace, war crimes and crimes against humanity, and that decision had been approved by the General Assembly. Such a subdivision found practical justification in the Charters of the Nürnberg and Tokyo Tribunals, and the Commission had itself adopted the same classification, as early as 1950, in Principle VI of the Nürnberg Principles.[11] He agreed with that classification, even though the three categories overlapped at times, particularly war crimes and crimes against humanity.

27. Generally speaking, crimes against humanity were committed on political, national, ethnic, racial, religious or other similar grounds. In that connection, he agreed with Henri Meyrowitz, as cited in the fourth report, that the term "humanity" carried the connotations of culture and human dignity, on which basis the Special Rapporteur had in that report conceived of a crime against humanity in the threefold sense of cruelty directed against human existence, the degradation of human dignity and the destruction of human culture.[12] Motivation, too, was important, for otherwise the word "humanity" might not suffice to distinguish the characteristics of a crime against humanity from those of a war crime, especially where a crime against humanity was committed in time of war. Because of that element of motivation, the massive or systematic nature of an act, though important, might not be the decisive criterion in deciding what constituted that category of crime as distinct from ordinary crimes.

28. Neither of the alternatives proposed for draft article 13 contained a list of acts constituting war crimes. Opinions in the Commission were divided on the need for such a list, although both schools of thought recognized that an exhaustive list would be impossible. His own view, however, was that, for the sake of balance with the articles on the other two categories of crimes, an indicative list of war crimes should follow the general definition.

29. As far as terminology was concerned, he favoured the second alternative of article 13. War as a legal concept which created rights and obligations for the belligerent States under traditional international law was obsolete and, since war had been prohibited as an instrument of policy, it had become anomalous to have rules and customs of war, with rights and duties for the perpetrators of wars of aggression. Also, the perpetrators of such wars often used terms such as "incident" or "conflict" to preclude condemnation and the application of the rules and customs of war to the victims. Hence the expression "rules of international law applicable in armed conflict", in the second alternative, was obviously preferable to the words "laws or customs of war", in the first. Furthermore, under the relevant legal instruments of the post-Second World War period, the concept of armed conflict now encompassed not only armed conflicts between sovereign States, but also conflicts in which peoples fought against colonial domination, alien occupation and racist régimes in the exercise of their right to self-determination, as well as armed conflicts in the nature of civil strife within a State. If the Commission retained the second alternative, however, it should consider whether the title of the article, "War crimes", was appropriate or whether it should not be replaced by a new title such as "Crimes against rules of international law applicable in armed conflict".

30. There remained the question whether, to constitute a war crime, an act must be a violation, or a "serious" violation, of the rules of international law applicable in armed conflict. Under ordinary criminal law, of course, the punishment for a particular crime could depend on the circumstances in which that crime was committed and on the degree of seriousness involved. Murder was a case in point, being divided under the criminal law of some countries into first and second degree murder and punishable accordingly. The fact that the Commission had decided that the code should cover only crimes of the most serious nature, however, led him to the unmistakable conclusion that only serious violations or grave breaches constituted war crimes. Indeed, that was borne out by article 85, paragraph 5, of Additional Protocol I[13] to the 1949 Geneva Conventions, which provided that "grave breaches of these instruments shall be regarded as war crimes".

31. Draft article 14 was generally acceptable. He endorsed the inclusion of genocide as a crime against humanity, as was fully justified because of its serious nature and the international community's unanimity in condemning it. It was right that the term "genocide" itself should have its proper place in paragraph 1, and he was not altogether sure why the term had not figured in article 2, paragraph (10), of the 1954 draft code.

32. The purpose of including *apartheid*, which was already recognized as a crime against humanity in many legal instruments, was to update the 1954 draft code. Of the two alternatives proposed for paragraph 2, he preferred the second, which reproduced the terms of article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*. As a number of States were still not parties to that Convention, it might be more acceptable if no reference were made to it. The words "as practised in southern Africa", which appeared between square brackets, could be deleted, since the draft code was of general application and forms of *apartheid* other than those currently practised in South Africa might well emerge. However, he was by no means sanguine about any impending end to *apartheid* in South Africa. Indeed, the

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

[11] See 2096th meeting, footnote 14.

[12] See *Yearbook . . . 1986*, vol. II (Part One), p. 56, document A/CN.4/398, para. 12.

[13] See 2096th meeting, footnote 11.

international community should decide to take more effective joint measures to eradicate such practices there.

33. While he had no objection to the inclusion of slavery (para. 3) as a crime against humanity, it was important to clarify the relevant forms of slavery, in contradistinction to the form that was a crime under the ordinary law of many countries. He, too, agreed that "forced labour" was a very broad term and required clarification in that context.

34. Again, he had no objection to paragraph 4, except that, in his view, its three subparagraphs were couched in unduly general terms and required drafting improvements.

35. As to paragraph 5, "inhuman acts" should indeed comprise offences against the person and offences against property. The Special Rapporteur had been right to include destruction of property as a crime against humanity and had also properly emphasized the need to conserve property deemed to be part of the heritage of mankind. In that connection, it should be borne in mind that the cultural heritage of one people or nation itself formed an integral part of the cultural heritage of mankind as a whole. Accordingly, in addition to the general reference to property, paragraph 5 should also make a specific reference to property as a cultural heritage. Furthermore, as the Special Rapporteur had pointed out, were it not for the element of motivation, the acts referred to in that paragraph might be indistinguishable from ordinary crimes under national criminal codes.

36. Lastly, he agreed that paragraph 6 should be brought more into line with paragraph 3 (*d*) of article 19 of part 1 of the draft articles on State responsibility.[14]

37. The CHAIRMAN proposed that the Commission should adjourn to allow the Drafting Committee to meet.

It was so agreed.

The meeting rose at 11.30 a.m.

[14] *Ibid.*, footnote 19.

2099th MEETING

Wednesday, 10 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Barboza, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/411,[2] A/CN.4/419,[3] A/CN.4/L.431, sect. D, ILC(XLI)/Conf.Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 13 (War crimes) *and*
ARTICLE 14 (Crimes against humanity)[4] (*continued*)

1. Mr. BARBOZA congratulated the Special Rapporteur on the quality of his seventh report (A/CN.4/419) and his introductory statement.

2. Referring to draft article 13, he pointed out that the second alternative of the corresponding article submitted by the Special Rapporteur in 1986[5] had contained the usual definition of war crimes accompanied by a list of acts constituting war crimes, namely: (*a*) all the offences mentioned in the 1949 Geneva Conventions[6] and in Additional Protocol I[7] thereto, in other words "grave breaches"; (*b*) other acts, in particular the use of certain weapons, which were not the aforementioned "grave breaches", but which nevertheless constituted war crimes. In addition to those two categories, there was a third category of war crimes, but they were not serious enough to be included in the draft code, as the Special Rapporteur pointed out (*ibid.*, para. 24).

3. Neither of the two alternatives proposed at the present session contained a list of war crimes and the Special Rapporteur explained why in his report (*ibid.*, para. 4); hence the Martens clause favoured by ICRC (*ibid.*, paras. 5-6), which had the advantage of adapting better to constantly changing realities (*ibid.*, para. 9). Several members of the Commission had, however, already expressed their preference for a list, mainly for the sake of the clarity and precision called for by a liberal conception of criminal law, especially the principle *nullum crimen sine lege, nulla poena sine lege*. It was central to those members' thinking that a code of crimes against the peace and security of mankind should deal only with grave breaches. The other members of the Commission had not rejected that argument, but were prepared to leave it to the judge to determine the seriousness of the act in question. In fact, the two groups of members did not attach the same meaning to the term "grave", and that misunderstanding would have to be resolved.

4. A distinction had to be made between grave breaches and serious violations. The former were serious because the act in itself was inherently so: for example, homicide was a more serious offence than embezzlement because it was a more serious matter to kill someone than to steal his

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] For the texts, see 2096th meeting, para. 2.

[5] See 2096th meeting, footnote 4.

[6] *Ibid.*, footnote 10.

[7] *Ibid.*, footnote 11.

money. That was quite naturally reflected in the applicable penalties: in internal law, the scale of penalties provided for in penal codes gave an idea of the seriousness of offences. However, a *violation* could be considered more or less serious in relation to one and the same criminal *breach* depending on whether the circumstances in which it had taken place were aggravating or mitigating. In such a case, the task of assessing the "seriousness" of the act was essentially a judicial function and the judge had to rely exclusively on the facts of the case. In general, the judge had the power to bring the penalty into line with those facts: the Penal Code of Argentina, for example, punished ordinary homicide with a term of imprisonment ranging from 8 to 25 years, and the judge could adjust the punishment within those limits.

5. It was thus the gravity of the breach and not of the violation that should concern the Commission: if the code was to cover only grave breaches, the Commission, in its legislative capacity, had to rule on the question of the gravity of the breach and could not leave that task to the discretion of the courts without departing considerably from the liberal principles of criminal law. It therefore had to draw a distinction between grave breaches and those which were less grave and, to that end, it had to draw up a list of breaches that were grave enough to be characterized as war crimes. Mr. Arangio-Ruiz's concern (2097th meeting) that leaving out less grave breaches might endanger the existing rules of the law of war could be met by including in the draft code a clause stating that its provisions were without prejudice to the punishment of breaches not referred to therein. That solution was, of course, contrary to the idea of an instrument which would keep pace with developments in the law of war and which was not static, as indicated by the Special Rapporteur (A/CN.4/419, para. 9). But if developments in the law of war did occur and if new reprehensible acts or types of conduct emerged, the solution would be to define new breaches by the usual method of treaty or custom, and those breaches would then be punishable as war crimes not included in the code.

6. The other possibility would obviously be not to take account of the concept of the gravity of breaches and to include war crimes wholesale in the code by adopting the first alternative of draft article 13 without the word "serious", which was now between square brackets. The judge would thus be in a position to punish any of the violations that could constitute a war crime. That was, moreover, the "real" Martens clause, which made no distinction between war crimes that were serious and those that were not.

7. His own preference was for a list, without any general definition. He could not accept a definition such as that proposed in either of the two alternatives, followed by a merely *indicative* list, for that would confer upon the judge a power that did not belong to him to determine the gravity of those breaches that were not listed in the code. In the case of article 12 (Aggression),[8] the Commission had provisionally adopted a text consisting of a definition and an illustrative list of acts and conduct constituting acts of aggression, but that case was different: the definition of the crime of aggression in that text was not simply a *renvoi*; it was a genuine general definition, followed by examples of acts or conduct. In the case of article 13, however, the Special Rapporteur was simply proposing to define a war crime as any violation of the laws or customs of war: that referred to another concept which was not itself defined and the problem of determining the gravity of the breach remained.

8. The present title of draft article 13—"War crimes"—could be retained, but, in the text, the term "war" should be replaced by the expression "armed conflict" in order to cover every type of conflict to which the code was to apply.

9. It must be admitted that, in the context of crimes against the peace and security of mankind, war crimes had their own particular characteristics and, in that connection, it had always been difficult for him to give uniform content to the topic under the title "peace and security", as he had noted at the Commission's thirty-eighth session.[9] One of the particular characteristics of war crimes was that their inclusion in the code could not be justified on the grounds of the defence of peace, since, for a war crime to be committed, there had to be a state of war and not a state of peace. It was even open to question whether the acts and conduct covered by the concept of war crimes really affected the security of mankind.

10. Referring to draft article 14, he said that, in the case of crimes against humanity as in the case of war crimes, the concept of the "peace and security of mankind" as the object of the protection to be ensured by the code was questionable. In that case as well, it had to be determined what was meant by the expression "crimes against humanity" and the first question that arose was whether that expression did not go beyond the limits of the general subject-matter of the code. The term "humanity" appeared to be much broader than the expression "security of mankind", especially if "humanity" was taken in the sense not only of mankind, but also of the "humanitarian" sentiment on which the inclusion of "inhuman acts" in paragraph 5 seemed to have been based. Mr. Barsegov (2097th meeting) seemed to have demonstrated that, historically, the term "humanity" had been interpreted exclusively as a synonym of "mankind". In any event, it was obvious that the term "humanity" had a much broader connotation than the expression "security of mankind", since not everything that affected mankind necessarily endangered its security. It was thus possible to conclude that the title of the present topic did not correspond exactly to the content of the crimes meant to be included in the code. The reason for that lack of consistency, as he had pointed out at the thirty-eighth session, "lay in history, which had handed down to the Commission a form of wording taken from a report addressed by Judge Francis Biddle to President Truman . . . and perhaps more in keeping with the thinking of the time than with logical reasoning".[10] At that time, he had questioned whether the Commission should not try to find another title for the draft code. Now, however, he thought that efforts should be made to work out a formal definition of the expression "peace and security of mankind". That definition, formulated on a sound legal basis, would be included in draft article 10, entitled "Categories of offences against the peace and security of mankind", submitted by

[8] *Yearbook . . . 1988*, vol. II (Part Two), pp. 71-72.

[9] *Yearbook . . . 1986*, vol. I, p. 163, 1967th meeting, para. 64.

[10] *Ibid.*

the Special Rapporteur in his fourth report, in 1986,[11] and would in fact justify the existence of that article.

11. Analysing the acts and conduct which the Special Rapporteur proposed to characterize as crimes against humanity in article 14, he said that he had no comments so far as genocide (para. 1) was concerned. With regard to *apartheid* (para. 2), he expressed his preference for the second alternative, with the deletion of words between square brackets, namely "as practised in southern Africa", so as to give the crime a universal character. As to forced labour (para. 3), he considered that account should be taken of the remarks made by Mr. Tomuschat (2096th meeting), Mr. Mahiou (2097th meeting) and Mr. Sepúlveda Gutiérrez (2098th meeting), as well as of the rules established by ILO in the matter.

12. With regard to paragraph 4, he commended the Special Rapporteur for having followed the suggestions of certain members of the Commission, including himself, by incorporating provisions of that kind in the draft code. The world was still witnessing the consequences and suffering caused—sometimes for centuries—by the expulsion of populations, the establishment of settlers in occupied territories and changes to the demographic composition of a particular territory. Of all the acts and conduct of that kind, he would cite only one example, but one that wounded the sentiments of his country, namely that involving the Falkland Islands (Malvinas), where an Argentine population had been expelled under threat from a British gunboat and replaced by British settlers, still protected now by a powerful military force.

13. While the inclusion of inhuman acts in the draft code could no doubt be justified on many grounds, it would be called into question if the concept of humanity was not defined. If "humanity" denoted solely mankind, and not humanitarian sentiment, there might be doubt as to whether acts of the kind referred to in paragraph 5 really affected the security of mankind. That was an additional argument in favour of the Commission re-examining either the title of the draft or its precise scope.

14. Lastly, he agreed with the inclusion of the provision in paragraph 6, although, in his view, it was too vague. It was necessary to know precisely what the Commission wanted to protect thereby. In the case of the human environment, the position was clear, but to determine what constituted a "vital human asset" was not part of the judicial function. It was therefore for the Commission to indicate those vital human assets harm to which would constitute a crime.

15. Mr. OGISO, congratulating the Special Rapporteur on his seventh report (A/CN.4/419), said that he would confine his comments to draft article 13, but reserved the right to speak later on draft article 14.

16. In his view, the definition of war crimes should contain three elements: the rules of humanitarian law, as defined in the 1949 Geneva Conventions and the Additional Protocols thereto—which would enable both wars and armed conflicts to be covered; the customs of war—a term of art used in a number of conventions and military codes; and the rules set forth in other international agreements prohibiting the use of certain weapons, in particular weapons of mass destruction. He noted, however, that the first alternative of article 13 proposed by the Special Rapporteur made no specific mention of the international instruments prohibiting the use of certain weapons and that, in the second alternative, the customs of war were only implied in the expression "principles and rules of international law". He therefore considered that the two alternatives should be reformulated in the manner he had indicated.

17. As to the question of the seriousness of the violations that constituted a war crime, he recognized the need to qualify the acts referred to on that basis. The Commission had already discussed the question and had apparently wished to limit the characterization of crimes against the peace and security of mankind to the most serious violations, other violations of the rules of international law or of the customs of war and particularly violations of a technical nature being punishable by national military courts. If, however, the Special Rapporteur considered the word "grave" inappropriate because of the connotations it had in Additional Protocol I[12] to the Geneva Conventions, the word "serious" could be used.

18. He nevertheless had a reservation to make. If it was for the judge to determine the seriousness of the violation, the judgment would differ substantially depending on whether the court was a national or an international one. An international court, being less influenced by emotional elements, would certainly be in a better position to arrive at an objective decision. That question should be discussed at a future session.

19. As to a possible list of war crimes, he concurred with the Special Rapporteur: it would be inadvisable to draw up such a list, even one of a non-exhaustive nature, if only for practical reasons. In the first place, it was difficult to see how the code could refer to all the important principles of the Geneva Conventions and the Additional Protocols thereto. Secondly, to enumerate the "customs of war" would require special expertise. Lastly, irrespective of whether the Geneva Conventions or other international instruments were concerned, it must be remembered that a considerable number of States parties had made reservations or interpretative declarations when signing. In the circumstances, there was no certainty that the rules of those conventions could be transposed to the draft code in simple and clear-cut terms. If the majority of members of the Commission were in favour of the list, however, he trusted that the Special Rapporteur would submit a concrete enumeration, perhaps of a non-exhaustive nature, on the basis of which the Commission could consider what acts should constitute crimes. He reserved the right to speak again on the list itself.

20. Mr. FRANCIS, referring to draft article 13, said that he preferred the second alternative submitted by the Special Rapporteur. In the first place, paragraph (*a*) of that alternative specified that the violation had to be "serious" to constitute a war crime, and that was consistent with the decision already taken by the Commission and approved by the General Assembly. Secondly, paragraph (*b*) was broader in scope than the corresponding paragraph of the first alternative, since it covered not only the international agreements by which the parties to the conflict were bound,

[11] *Yearbook . . . 1986*, vol. II (Part One), p. 83, document A/CN.4/398.

[12] See 2096th meeting, footnote 11.

but also the generally recognized principles and rules of international law applicable to armed conflicts. That wording had the advantage of referring to the important body of law which existed in the matter and, in particular—without mentioning them expressly—to the 1949 Geneva Conventions, and that would allow for more latitude in the application of the code.

21. Although the second alternative was therefore preferable, paragraph (*b*) would more appropriately be placed in another part of the draft code. Its content could, for instance, be transferred to the traditional article on definitions. Also, as Mr. Mahiou (2097th meeting) had recommended, the last phrase could be divided and a separate definition given of what was to be understood by the expression "armed conflict".

22. The second alternative would, however, still be incomplete if it were not accompanied by a non-exhaustive list of war crimes, as several speakers had already said. In his seventh report (A/CN.4/419, paras. 4-10), the Special Rapporteur, relying on instruments, doctrine and publicists, had stated the reasons which, in his view, tended to discourage any attempt at such an undertaking. Yet at least two factors militated in favour of such a solution. In the first place, it was possible that the application of the code would be a matter not simply for an international body, but also, and above all, for universal jurisdiction. It was unlikely, however, that national courts would have many specialists in international law and, if a war crime was not defined in very specific terms, the application of the code would not proceed smoothly. Also, as history showed, violations of the law of war were not committed only by armies: it sufficed to call to mind current events in the Middle East, Latin America and Asia, where not only soldiers, but also civilians and even children were involved. A list would therefore have the advantage of making everyone realize, and in an explicit manner, what was and was not criminal. For those reasons, he considered that, in so far as possible, article 13 should contain a non-exhaustive list of war crimes.

23. Turning to the crucial question of the "gravity" of the violations that constituted war crimes, he noted that such crimes were always "serious" ones, at any rate in subjective terms. If the code was to have real meaning, however, it would have to recognize several degrees of gravity, as the Special Rapporteur advised. A distinction had to be made between a soldier withholding a meal from a prisoner and a soldier subjecting a prisoner to torture. Many other examples could be cited to illustrate the possible range of violations: the need to characterize war crimes by reference to their gravity was dictated by their very number.

24. Commenting on draft article 14, and in particular on the question of *apartheid*, he said that, in defining that crime, the phrase in the first alternative of paragraph 2 reading "the institution of any system of government based on racial, ethnic or religious discrimination" could be used as a *chapeau* to introduce a detailed enumeration of the policies and practices constituting *apartheid*. One remark was called for: for the time being, such policies and practices provided the only instance in which every aspect of the future code was already being contravened. Bearing in mind that, in addition, the phenomenon had already endured for 40 years, notwithstanding the intervention of the United Nations, it was obvious that *apartheid* must be included in the code.

25. With regard to slavery, the words "Slavery and all other forms of bondage, including forced labour" in paragraph 3 seemed to lack clarity. There were, for instance, relations between bondage and slavery that were not reciprocal. To avoid any confusion, it would be better to refer to slavery alone, if necessary placing bondage and forced labour elsewhere in the draft.

26. The Special Rapporteur's comments on the proposed articles were excellent, particularly the paragraphs dealing with attacks on property (*ibid.*, paras. 47-58). Valid reasons were given in support of those considerations and it was quite right that attacks on property should be covered by the code. The views expressed in relation to the historic phenomenon of slavery in Africa (*ibid.*, para. 52) were very relevant. The Special Rapporteur also gave a convincing analysis with regard to the mass or systematic nature of crimes against humanity and one could conclude, as he did (*ibid.*, para. 67), that an individual act could constitute a crime against humanity if, though lacking any mass element, it constituted a link in a chain and was part of a system or plan.

27. He suggested that draft articles 13 and 14 should be referred to the Drafting Committee.

28. Mr. KOROMA said that, in connection with draft article 13, the Special Rapporteur was asking the Commission to concentrate on three questions: the definition of war crimes, terminology and the criterion of gravity.

29. With regard to the first question, some members of the Commission considered it preferable to have only a general definition of war crimes, while others were in favour of adding a list of criminal acts to the definition. The two positions were not fundamentally opposed, since it went without saying that such a list would in any case be merely indicative. If the Commission decided to draw up such a list, it could take as its basis the Charter of the Nürnberg Tribunal,[13] which, as Mr. Yankov (2098th meeting) had pointed out, defined war crimes as being "violations of the laws or customs of war" and went on to provide a non-exhaustive list of those crimes: murder, ill-treatment, deportation of civilian populations, etc. (art. 6 (*b*)). He did not, however, see any serious drawback in relying on a sufficiently broad general definition, if that was the wish of the majority of members of the Commission. But it was at that point that terminological problems arose.

30. Although the laws of war nowadays derived primarily from conventions, the importance of custom should not be overlooked. Not only were the Hague Conventions of 1899 and 1907 on the laws and customs of war on land[14] still in force, but they contained provisions which related to the protection of civilians, and the 1949 Geneva Convention on the subject was even regarded as supplementary to sections II and III of the Regulations annexed to the 1907 Hague Convention. The preamble to the 1907 Hague Convention stated:

> Until a more complete code of the laws of war has been issued . . . in cases not included in the Regulations . . . the inhabitants and the

[13] *Ibid.*, footnote 7.

[14] See J. B. Scott, *op. cit.* (2096th meeting, footnote 5), p. 100.

belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

It was on the basis of those principles that, as the Special Rapporteur recalled in his seventh report (A/CN.4/419, para. 9), the Nürnberg Tribunal had maintained that the laws of war were not to be found solely in treaties, but also emerged from the customs and practices that had been gradually and universally recognized by doctrine and in the jurisprudence of military courts. It was also true that that law was not static and that, by continual adaptation, it followed the needs of a changing world.

31. He therefore shared Mr. Ogiso's point of view and considered that the definition adopted by the Commission should take account both of customary law and of the conventions on the laws of war, as well as of the conventions and general principles of law concerning armed conflict. Accordingly, he preferred the second alternative proposed for draft article 13. He also considered it important to refer to "armed conflict" rather than to "war", so that there would be no legal *lacuna* in the definition of war crimes. In carrying out its task of progressive development of the law, the Commission had to adopt the new terminology accepted by the international community as a whole.

32. With regard to the criterion of gravity, he considered that, strictly speaking, the issue was one of penalties rather than of definition. In fact, any violation of the laws of war constituted a war crime, the perpetrator of which was liable under civil and criminal law, regardless of the seriousness of the act. As the Special Rapporteur had pointed out, the concept of "grave breaches" had first been used in the 1949 Geneva Conventions, such breaches being war crimes if they were committed in isolation or on a limited scale and crimes against humanity if they were committed on a large scale, regardless of their gravity. Gravity was thus linked not to the nature of the act, but to the circumstances in which it was committed. That point was also borne out by the Geneva Conventions, which established universal jurisdiction for all such crimes. He was therefore in favour of the deletion of the term "serious" appearing between square brackets in draft article 13.

33. Referring to draft article 14, he said that, while he welcomed the fact that the Special Rapporteur had again dealt with the concept of crimes against humanity, he thought that it would be useful to give a definition of such crimes. All the necessary elements for such a definition were, moreover, to be found in the seventh report. In his view, the most important one was that such crimes should have been committed against mankind as a whole, against the human race itself. If the Commission decided to adopt a definition, it could draw inspiration from article 6 (*c*) of the Charter of the Nürnberg Tribunal, which defined crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds . . . ".

34. He thought that no one would object to the inclusion of genocide and *apartheid* in the category of crimes against humanity. Moreover, many States had ratified the Convention on the Prevention and Punishment of the Crime of Genocide. *Apartheid* had long since been universally condemned by the international community as a flagrant violation of international law and as a crime against humanity. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,[15] for example, had added "eviction by armed attack or occupation and inhuman acts resulting from the policy of *apartheid* . . . even if such acts do not constitute a violation of the domestic law of the country in which they were committed" (art. I (*b*)) to the crimes against humanity defined in the Charter of the Nürnberg Tribunal. Similarly, article 85, paragraph 4 (*c*), of Additional Protocol I[16] to the 1949 Geneva Conventions had regarded "practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" as grave breaches.

35. Of the two alternatives proposed for paragraph 2 of article 14, on *apartheid*, he preferred the second. Although it reproduced virtually word for word article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, which had, it should be remembered, been adopted by the overwhelming majority of States throughout the world, it did not specifically mention that Convention, and that might enable a larger number of States to accept it. For the same reasons, he was also of the opinion that the reference to southern Africa in the second alternative should be retained, although he would, of course, have no objection in principle to its deletion. While it was true that the acts referred to were also committed in other parts of the world, it was only in southern Africa that *apartheid* had been made an official policy: in the other countries in which the problem existed, efforts were being made to overcome it. If the definition were broadened, it might be more difficult for States to accept.

36. He was also in favour of including among crimes against humanity slavery and the slave trade, as well as the expulsion or forcible transfer of populations from their territory and changes to the demographic composition of a territory. In various parts of the world, it still happened that, in the name of development, indigenous populations were expelled from their territories or forcibly transferred or that a foreign population was settled on a territory at the cost of enormous suffering for all. Condemnation of that phenomenon by the Commission could have a salutary effect and could help to end such cruel practices.

37. Finally, he said that he agreed with the inclusion in the draft code of attacks on property having cultural value.

38. Mr. CALERO RODRIGUES said that he would focus on crimes against humanity. Before dealing with the provisions proposed by the Special Rapporteur, however, he wished to make some general comments which could also apply to other parts of the draft code.

39. The division of the draft into three parts—crimes against peace, war crimes and crimes against humanity—was useful, but solely for reasons of convenience: such a categorization of crimes could not otherwise be justified, since one and the same act could very well be characterized as a crime under more than one heading. It would therefore be preferable if the expressions "crimes against peace", "war

[15] United Nations, *Treaty Series*, vol. 754, p. 73.

[16] See 2096th meeting, footnote 11.

crimes" and "crimes against humanity" constituted no more than section headings within the various parts of the draft code and if the code itself, like most criminal codes, began with a part devoted to general principles, followed by a part dealing with each act constituting a crime. The Commission should keep to the idea of devoting a separate article to each crime—particularly those listed in draft article 14—which could be combined under the heading "Crimes against humanity".

40. The wording of the draft articles also called for an effort to achieve uniformity. Each draft article in the second part should describe the acts which fell within the scope of the code, rather than concepts or situations of a general nature. That drafting work would be facilitated by the presence of a preliminary article that might read: "The acts described in the present part constitute crimes against the peace and security of mankind", or "The acts described in the present part are crimes punishable under the present Code", or "The acts described in the present part constitute crimes against the peace and security of mankind which are subject to the penalties indicated in each article" (assuming that the Commission would include provisions concerning the applicable penalties in the draft code). The work done so far on the question was lacking precisely because the Commission had not yet decided whether penalties would be included in the draft, whether it would leave it to national courts to determine penalties or whether the code would refer in that regard to the legislation of States. In his view, a legal instrument could not be described as a code if it did not make provision for penalties.

41. Like Mr. Mahiou (2097th meeting), he considered that draft article 14 did not raise any particular problems of substance. The list of six crimes did not give rise to any objections, and it had not been suggested that others should be added. The only problem related to the way in which the crimes were to be defined; it should not be difficult to arrive at a text that was acceptable to the majority of the members of the Commission. The main task in connection with crimes against humanity thus had to be carried out by the Drafting Committee.

42. In defining the first two crimes, genocide and *apartheid*, the Commission could look for inspiration to various treaties. Indeed, for the purpose of defining the crimes covered by the code, it should, in general, depart as little as possible from the existing international instruments. The Special Rapporteur had therefore been right to follow closely the text of the Convention on the Prevention and Punishment of the Crime of Genocide, which was particularly useful since its article II listed five acts that constituted genocide. He wondered, however, what meaning should be attached to the word "including" in draft paragraph 1 of draft article 14, since the list which followed was apparently, despite that word, an exhaustive one. The list contained in article II of the Genocide Convention had in fact been devised in that sense.

43. In the case of *apartheid* (para. 2), the International Convention on the Suppression and Punishment of the Crime of *Apartheid* was rather less useful because the crime of *apartheid* included a number of "policies" and that term required some clarification. The Commission could attempt to define the acts listed in article II of the Convention by making its wording clearer and perhaps by referring expressly to acts committed in the context of *apartheid*.

44. There were also conventions relating to slavery (para. 3), but they referred to institutions and the text would need adaptation in order to specify exactly which acts came under the heading of slavery. Like other members of the Commission, he felt that caution was called for where "forced labour" was concerned. Article 5 of the Slavery Convention[17] did refer to forced labour, but it said no more than that States parties were obliged to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery. Hence the Convention referred not so much to forced labour as to the risk that forced labour might become slavery. Indeed, the Convention—which, of course, dated from 1926—tolerated compulsory or forced labour for public purposes. Two institutions, debt servitude and serfdom, had subsequently been declared unlawful. Forced labour itself had been abolished by ILO Convention No. 105[18] in 1957. Those instruments might serve as a basis for the Commission's work, so long as they were adapted to give a clear definition of the acts prohibited by the code.

45. In his view, paragraph 4 of draft article 14 lacked rigour, first because it was not clear what was meant by the words "their territory" in subparagraph (*a*) and it would be better to refer to "occupied territory"; and, secondly, because "changes to the demographic composition of a foreign territory" (subpara. (*c*)) could only be the result of the expulsion or forcible transfer of a population, of the establishment of settlers, or of a combination of both. For that paragraph as well, the Commission could look to an international instrument, namely Additional Protocol I[19] to the 1949 Geneva Conventions, article 85, paragraph 4 (*a*), of which referred to the following as acts constituting grave breaches: "The transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of article 49 of the Fourth Convention."

46. Paragraph 5 of draft article 14 was a good starting-point, but all of the acts listed in it, particularly the mass destruction of property, would have to be carefully considered to see whether they belonged in that provision, and the reasons why would have to be clearly explained.

47. Lastly, like other members of the Commission, he thought that the concept of a "vital human asset" (para. 6) was too vague. If the Commission decided to retain that expression, it would have to define it more precisely. In any event, serious and intentional harm to cultural property would be better included in paragraph 5 or in a separate article than in the provision dealing with serious and intentional harm to the environment. There again, useful guidance was to be found in Additional Protocol I, article 55, paragraph 1, of which stated: "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. . . . " The Commission would also do well to refer to article 19 of part 1 of the draft articles on State responsibility.[20]

[17] League of Nations, *Treaty Series*, vol. LX, p. 253.

[18] See 2096th meeting, footnote 24.

[19] *Ibid.*, footnote 11.

[20] *Ibid.*, footnote 19.

48. In reply to Mr. Koroma, who had argued that any breach of the Geneva Conventions would constitute a war crime, he pointed out that that was not what was said in article 85, paragraph 5, of Additional Protocol I, on the repression of breaches: "Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes." For a crime to exist, according to that paragraph, the breach must therefore be a "grave" one. He agreed, however, with Mr. Barboza's view of the matter, which corresponded to the concept of a grave breach as referred to in the Conventions and the Additional Protocols thereto, particularly article 147 of the Fourth Convention,[21] which read:

> Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

49. It was thus apparent that the Geneva Conventions and the Additional Protocols thereto did not refer only to breaches and grave breaches; they specified which acts constituted grave breaches. The Commission could make use of them, for example, to draw up a list of crimes, although he personally had doubts about the advisability of a list, since it was impossible to compile a complete list and an indicative list would not serve much purpose in legal terms. If the Commission wanted to refer to grave breaches, it could at least follow the example set in those instruments and state which acts constituted grave breaches.

50. Mr. BARSEGOV said he thought that the Commission's work on the present topic, as on other topics, would benefit if the members of the Commission were better informed about the work of other United Nations bodies. For example, the Sub-Commission on Prevention of Discrimination and Protection of Minorities had been dealing with questions of genocide for a very long time and it had carried out studies with a view to strengthening the effectiveness of the Convention on the Prevention and Punishment of the Crime of Genocide. Personally, he was not very optimistic about the action taken by States to combat genocide: there had been many acts of genocide since the Convention had been adopted and it had never been implemented. That was, however, the very reason why the Sub-Commission was concentrating on the problem. He asked whether the Secretariat could circulate to the members of the Commission the 1978 study on the question of the prevention and punishment of the crime of genocide[22] and the revised and updated version of that study prepared by B. Whitaker in 1985,[23] or at least the latter document.

51. The CHAIRMAN said that, although the Planning Group had discussed that point at the previous session, it might be advisable to revert to it, since it could well be useful to have certain documents available for reference purposes, including the studies mentioned by Mr. Barsegov, but also the draft international penal code of the International Association for Penal Law, with which all members of the Commission might not be familiar. He suggested that, in future, the special rapporteurs should be invited to give the Secretariat a list of the documents which members of the Commission might need when studying their reports.

52. Mr. CALERO RODRIGUES recalled that, in 1983, the Secretariat had prepared a compendium of international instruments relevant to the draft code.[24] If the Secretariat could not circulate all the instruments mentioned therein, perhaps it could update the compendium itself.

53. The CHAIRMAN pointed out that the compendium had also been circulated at the previous session in its original form.

54. Mr. KOROMA said that he was surprised to read in the penultimate paragraph of document ILC(XLI)/Conf.Room Doc.2 that the Commission would apply its work programme "without undue wastage of Secretariat resources". The Commission was not in the habit of wasting the resources at its disposal. The phrase implied a criticism of the Commission and should be deleted.

The meeting rose at 1 p.m.

[21] Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War (United Nations, *Treaty Series*, vol. 75, p. 287).

[22] E/CN.4/Sub.2/416.

[23] E/CN.4/Sub.2/1985/6 and Corr.1.

[24] Document A/CN.4/368 and Add.1 (mimeographed).

2100th MEETING

Thursday, 11 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/411,[2] A/CN.4/419,[3] A/CN.4/L.431, sect. D, ILC(XLI)/Conf.Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

ARTICLE 13 (War crimes) *and*

ARTICLE 14 (Crimes against humanity)[4] *(continued)*

1. Mr. ROUCOUNAS, referring to draft article 14, said that, like Mr. Barsegov (2099th meeting), he had been tempted when analysing the proposed text to seek out other documents relating to the crime of genocide produced by United Nations human rights bodies. The most recent report on the question, prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1985,[5] revealed that genocide was, unfortunately, not confined to the past. As Mr. Boutros-Ghali had pointed out (2097th meeting), in some cases it had been possible to mobilize world public opinion only after the event. Moreover, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide had rarely been invoked in the courts: only one such case was referred to in the 1985 report.

2. The Special Rapporteur's approach in article 14 had considerable merit, not least in that he had inserted the word "including" before the list of crimes of genocide in paragraph 1. Under the 1948 Convention, competence in such cases was confined to the courts of the country or territory in which the alleged acts had been committed, a restriction which was only partly removed by General Assembly resolution 3074 (XXVIII) of 3 December 1973 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. The draft code under consideration addressed those shortcomings and expanded the scope of the concept of genocide to cover acts intended to bring about the destruction in whole or in part of a national, ethnic, racial or religious group.

3. Whereas the definition in the 1948 Convention did not extend to all acts of genocide, the International Convention on the Suppression and Punishment of the Crime of *Apartheid* had been criticized by some Governments as being too broad. In his view, the first alternative proposed for paragraph 2 of article 14 should not be used, for the reasons he had explained (2096th meeting) in connection with the first alternative of draft article 13. It was perfectly possible to adopt language identical or similar to that of a convention without citing the instrument *expressis verbis* and to provide the necessary references in the commentary. In the second alternative of paragraph 2, it would be wise to delete the words between square brackets, "as practised in southern Africa", in the interests of bringing the introductory clause into line with the description that followed. Indeed, the whole of the introductory clause could usefully be re-examined.

4. In the matter of slavery (para. 3), the often quoted *obiter dictum* of the ICJ on obligations *erga omnes* had given rise to an extensive literature. However, the ICJ had clearly stated that at least three crimes were universally punishable, and it was plain that that aspect should be mentioned in the draft. The Commission could choose between the traditional concept of slavery as embodied in the 1926 Slavery Convention[6] and the broader definition in the 1956 Supplementary Convention,[7] which spoke of "slavery . . . and institutions and practices similar to slavery". The competent United Nations bodies, in particular the Sub-Commission on Prevention of Discrimination and Protection of Minorities, had studied the problems relating to slavery and their reports could have a bearing on the formulation of the draft, since the concept of slavery had broadened in scope in recent years to include debt bondage and a variety of other forms of exploitation.

5. Attention should also be paid to the scope of the notion of forced labour, which had been approached differently by different organizations in the United Nations system and in the relevant international instruments. The International Labour Office, for example, tended to place a broad interpretation on ILO Convention No. 105 concerning the Abolition of Forced Labour.[8] It might be appropriate to refer to "slavery or forced labour similar to slavery" in order to highlight the connection between the two forms of exploitation and to indicate that both were crimes against the peace and security of mankind.

6. As to the expulsion of populations (para. 4), he had referred at the previous session to article 85 of Additional Protocol I[9] to the 1949 Geneva Conventions, but mention should also be made of article 147, on grave breaches, of the Fourth Geneva Convention,[10] which was universally accepted. The commentary prepared by Pictet in 1956[11] gave details in that regard and the analysis of article 49 of the Convention, on deportations, transfers and evacuations, indicated the scope of the prohibition. In addition, Schwarzenberger had explained the situation in the light of the 1907 Hague Convention and the relevant customary law, stating that "the illegality was taken for granted".[12]

7. Lastly, in his analysis of attacks on property in his seventh report (A/CN.4/419, paras. 47 *et seq.*), the Special Rapporteur properly distinguished between the destruction of property occurring in situations of armed conflict and that occurring when there was no armed conflict. He endorsed the criterion of mass scale used by the Special Rapporteur, and approved of the references to cultural genocide, which had not been covered by the 1948 Genocide Convention. Similarly, it was right to emphasize that the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict[13] was also aimed at the protection of such property in peacetime. Furthermore, the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage[14] was relevant to the question of attacks on cultural property in that it contained provisions on specified property registered and recognized as belonging to the common heritage of mankind.

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[4] For the texts, see 2096th meeting, para. 2.

[5] E/CN.4/Sub.2/1985/6 and Corr.1.

[6] See 2099th meeting, footnote 17.

[7] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (United Nations, *Treaty Series*, vol. 266, p. 3).

[8] See 2096th meeting, footnote 24.

[9] *Ibid.*, footnote 11.

[10] See 2099th meeting, footnote 21.

[11] J. S. Pictet, ed., *Commentary—Fourth Geneva Convention* (trans. R. Griffin and C. W. Dumbleton) (ICRC, 1958).

[12] G. Schwarzenberger, *International Law* (London, Stevens & Sons, 1968), vol. II, *The Law of Armed Conflict*, p. 227.

[13] United Nations, *Treaty Series*, vol. 249, p. 215.

[14] UNESCO, *Records of the General Conference, Seventeenth Session, Paris, 17 October to 21 November 1972*, vol. 1, *Resolutions, Recommendations*, p. 135.

8. Mr. SOLARI TUDELA said that he welcomed the Special Rapporteur's proposals, but had difficulty in accepting the first alternative of draft article 13 in that it referred to "the laws or customs of war", an expression which gave rise to a terminological problem since it embodied a concept superseded by developments in humanitarian law. War itself was outlawed by the Charter of the United Nations and hence that formulation was obsolete. The first alternative also posed a problem of substance, for the reference to Additional Protocol I to the 1949 Geneva Conventions could occasion difficulties for States not parties to that instrument.

9. If the second alternative was adopted, however, it should be understood that the international agreements referred to therein were those which enjoyed the support of a representative majority of States: to insist that the instruments concerned must be universally accepted would be to place obstacles in the path of codification and of general acceptance of the code itself.

10. In terms of drafting, the text should provide both a general definition of war crimes and a list of such crimes, albeit not an exhaustive one. Such an approach would be consistent with established precedents.

11. In draft article 14, on crimes against humanity, the Special Rapporteur's approach was different. The constant development of international penal law, which now encompassed crimes such as *apartheid*, offences against the human environment and the expulsion of populations—none of which was covered by the 1954 draft code—made it necessary to adopt a twofold definition, partly general and partly illustrative.

12. On the whole he agreed with the scope of the crime of genocide as set out in paragraph 1, which was compatible with the Convention on the Prevention and Punishment of the Crime of Genocide and with article 2, paragraph (10), of the 1954 draft code.

13. Of the alternative versions of paragraph 2, on *apartheid*, the second was the more detailed and therefore more suitable. Since the term itself derived its existence from the system practised in southern Africa, he saw no reason not to refer specifically to that region in the commentary to the article.

14. Some clarification was called for in paragraph 3, on slavery, bondage and forced labour. The paragraph incorporated in the draft code offences which constituted not only a breach of humanitarian law, but also a crime against humanity, and which would thus fall into the highest category of offence in international criminal law. The text should be made clearer so as to indicate what constituted such offences.

15. It was proper for the article to mention expulsion of populations from their territory (para. 4). His own country had itself experienced such a situation in the twentieth century, and the inclusion of such a crime in the draft code would help to prevent occurrences of that kind in the future. Paragraph 5, on inhuman acts, was acceptable in principle, but greater detail was needed with regard to the cases of persecution referred to. Persecution took very many different forms.

16. Finally, paragraph 6, which was designed to punish offences against vital human assets such as the human environment, provided that such acts would be considered as crimes against humanity so long as they were serious and intentional. There was a tendency nowadays to include that type of offence in criminal law: in France, for example, the Penal Code was to be revised to include a section on environmental crimes. At least one member of the Commission had emphasized the need for the element of intent to be present as a condition for identifying such offences, as the proposed text provided.

17. In wartime, acts which intentionally damaged the environment could be characterized without difficulty as war crimes and crimes against humanity: a nuclear attack or the use of chemical weapons would qualify for such twin characterization. A crime against humanity, however, could be committed in peacetime as well as in wartime. But in peacetime, an offence against the environment was more difficult to characterize, for even when the damage was serious the intention was in many cases something else. It might lie, for example, in the pursuit of financial gain, as in the case of the manufacture of chlorofluorocarbons, which destroyed the ozone layer and could turn the planet into a desert; or it might lie in the search for technological progress, as in the case of nuclear testing. In both cases, the intention would not have been to destroy or harm the environment, no matter how serious the damage actually was. Thus, instead of specifying intent, it should be provided that the acts in question must have been committed intentionally or knowingly against a vital human asset.

18. The purpose of the code was not merely to punish, but also to prevent, and in that way it would better achieve the objective of protecting vital human assets.

19. Mr. DÍAZ GONZÁLEZ said that the seventh report (A/CN.4/419) was a logical sequel to the Special Rapporteur's earlier reports and to the debates on the topic in the Commission and in the Sixth Committee of the General Assembly.

20. With regard to draft article 13, he would point out that the Charter of the United Nations contained a denunciation of war and it thus seemed out of place to refer to the "laws or customs of war" in the draft code. He therefore preferred the second alternative of the article, provided it was clearly established, by using the definition contained in the first alternative, that "armed conflict" included both international and non-international armed conflict.

21. The concept of a "serious violation", or grave breach, of the rules of international law had undergone considerable development, and had been characterized as an international crime both by the Nürnberg Tribunal and in the 1949 Geneva Conventions. The gravity of the breach contained a subjective element not readily open to definition. He therefore agreed with the view that a non-exhaustive list of examples of war crimes should be drawn up; such a list would also constitute a parallel to the lists of crimes against peace and crimes against humanity. Much work would be needed, however, to satisfy everybody who wished to include particular crimes. Defining the gravity of a breach was a practical as well as a theoretical problem. He wondered whether a series of murders by twos or threes would be a more or less heinous crime than rounding up the entire population of a village and shooting them. Given equal numbers, the result, namely the annihilation of a population, would be the same.

22. There were still certain difficulties to be overcome with regard to the second alternative. As for the expression

"laws or customs of war", it could be replaced by "principles and rules of international law".

23. With regard to draft article 14, he agreed with Mr. Boutros-Ghali (2097th meeting) that *apartheid*, as an institutionalized practice, was not confined to South Africa. There had in fact been cases in Latin America where an indigenous people had been eliminated in order to gain control over its territory and develop the land for other purposes. Such cases constituted a twofold crime: the crime of genocide, and a crime against humanity in that the environment and the ecological system were destroyed. In North America, too, minority populations had been herded into reserves. In law, to deprive a people on linguistic or cultural grounds of the right to enjoy the fruits of progress was a crime. Accordingly, he preferred the second alternative proposed for paragraph 2, which was much more specific and contained a non-exhaustive list of acts constituting *apartheid*. The words "as practised in southern Africa", in square brackets, should be deleted.

24. As for other crimes against humanity, some did not appear in the list, such as drug trafficking, which was an international offence under a series of existing international conventions. As an attack on the health of all humanity, it ought to be treated as a crime against humanity. Other comparable crimes were the use of nuclear devices in peacetime to destroy the environment, and the use of chemical weapons having indiscriminate effects during armed conflicts.

25. It was not anachronistic to include slavery in the list of crimes against humanity. It was, moreover, prohibited by the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, as well as by article 99 of the 1982 United Nations Convention on the Law of the Sea.[15] It should therefore be mentioned in the draft, but the definition should be brought up to date. As for the expulsion or forcible transfer of populations from their territories, it was vitally important that it should feature as a crime against humanity, in the formulation proposed by the Special Rapporteur (para. 4). Latin America was still suffering the effects of such forcible transfers by the colonialists. It was also right for forced labour to be included in the draft, since that, too, was part of the colonial system. Populations were sometimes transferred in order to transform the demographic composition of a territory, as had occurred in the Malvinas (Falkland) Islands, where the entire population had been expelled and replaced by settlers.

26. The inhuman acts enumerated in paragraph 5 should include the destruction of homes as well as the mass destruction of property. He agreed with the formulation of paragraph 6, especially the inclusion of the intentional element, which was fundamental in all penal law systems. Deliberate damage to a vital human asset might include the destruction of the environment and the property of an ethnic group.

27. Lastly, the Commission should seek to relate the content of articles 13 and 14 to article 19 of part 1 of the draft articles on State responsibility.[16]

28. Mr. BARSEGOV recalled that, at the Commission's thirty-ninth session, during the consideration of the Special Rapporteur's fifth report, he had pointed out that two notions, namely "motive" and "intent" as subjective constitutive elements of a crime, were not properly distinguished in the draft code, although they were separately identified in all legal systems.[17] Intent as a constitutive element of such crimes as genocide and *apartheid* was a well-established concept. It was, however, not clear whether the term "motive" was used in connection with crimes against humanity, as in previous reports, as a subjective constitutive element of the crime. It seemed that, in draft article 14, the Special Rapporteur was treating the existence of a motive as rendering the acts criminal. He wished, therefore, to clarify the significance of subjective elements in crimes against humanity, in particular genocide and *apartheid*.

29. According to the 1985 report on genocide prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities:[18]

> It is the element of intent to destroy a designated group wholly or partially which raises crimes of mass murder and against humanity to qualify as the special crime of genocide . . . Motive, on the other hand, is not mentioned as being relevant. (Para. 38.)

Evidence of that element of subjective intent was far more difficult to adduce than an objective test (para. 39); other cases of genocide were unlikely to be as thoroughly documented as the acts of genocide perpetrated by the Nazi régime. A court must therefore be able to infer the necessary intent from a sufficient body of evidence. In certain cases, that might include actions or omissions of such a degree of criminal negligence or recklessness that the defendant must reasonably be assumed to have been aware of the likely consequences of his conduct. That was a generally held view concerning the crime of genocide. Pieter Drost, in his 1959 study on genocide, had commented that, in the absence of any words to the contrary, the text of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide offered no pretext to presume the presence of an unwritten, additional element in the definition of the crime.[19] Whatever the reasons for its perpetration, whatever the open or secret motives for the acts or measures directed against the life of the protected group, if the members of the group as such were destroyed, the crime of genocide was being committed.

30. Furthermore, article III of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*[20] stated:

> International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations . . . whenever they:
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> (*a*) commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II . . . ;
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> . . .

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[15] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

[16] See 2096th meeting, footnote 19.

[17] See *Yearbook . . . 1987*, vol. I, pp. 46 *et seq.*, 1999th meeting, paras. 15 *et seq.*

[18] See footnote 5 above.

[19] P. N. Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples* (Leyden, A. W. Sythoff, 1959), book II, *Genocide*, p. 84.

[20] United Nations, *Treaty Series*, vol. 1015, p. 243.

That was an important provision which must be taken into account in the definition of genocide, *apartheid* and all other acts of the same kind covered by draft article 14.

31. Some members of the Commission had objected that, in paragraph 1 of article 14, the way in which the acts included within the definition of genocide were listed was not adequate as it gave the impression that the list was not exhaustive. That criticism was not justified, first because, in his view, it had no basis, and secondly, and more importantly, because the drafters of the 1948 Convention on Genocide had not included therein all the acts constituting the crime. At the time when the Convention was being elaborated, some representatives in the Sixth Committee of the General Assembly had pointed out that it was impossible to devise such an exhaustive list, since the concept of genocide was new and there was no way of foreseeing all the methods that might be resorted to by the perpetrators of genocide. Those representatives had referred to the Charter of the Nürnberg Tribunal in support of the argument that crimes other than those already qualified as war crimes could be tried as acts of genocide. Others had expressed the view that, in the absence of an exhaustive list, the principle *nulla poena sine lege* would be infringed. The feeling had been that a merely indicative list could give rise to problems of interpretation: the same acts might be regarded as a crime by one country, but not by another. It had also been argued that a subsequent updating of the list would always be possible, even though, in existing political conditions, the possibilities of supplementing the list were very narrow. Ultimately the latter considerations had prevailed.

32. The 1948 Convention had been elaborated in haste, under the impact of the events which had occurred in the Second World War. It had failed to take account of many existing precedents in which whole populations had been destroyed by depriving them of their means of subsistence, such as soil and water, or forcing them to emigrate—practices which had eliminated entire groups and which had been fully revealed after the adoption of the Convention. Moreover, not only acts, but also omissions might have the same effect. The 1985 report to which he had already referred (para. 29 above) explained that the conduct listed in articles II and III of the Convention as being punishable as genocide consisted exclusively of the commission of certain actions, but that results similar to those of the acts referred to in article II (*b*) and (*c*), for example, might be achieved by conscious acts of advertent omission (para. 40). In certain cases, calculated neglect or negligence might be sufficient to destroy a designated group, wholly or partially, through, for instance, famine or disease. Article II of the Convention was reflected in draft article 14. It was true that the formulation in paragraph 1 (iii) of the draft article, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", would include the death of an entire group from conditions such as cold, hunger or disease caused by so-called deportations.

33. It was clear that the deportation of entire populations could not be justified on grounds of State security or a state of war. He could not agree with Mr. Reuter (2098th meeting) that deportation was sometimes the lesser of two evils. It was true that deportations had sometimes occurred on the basis of international agreements, for example an exchange of populations in the context of a peace treaty. But the Commission was not considering that kind of deportation. There were historical precedents of deportation being carried out deliberately for the purpose of eliminating or destroying a national group, on religious or racial grounds. There was much documented evidence of deportations of that type. Certain such evidence could be found in reports by German consular and diplomatic agents in the Ottoman Empire, who had described the deportations as tantamount to mass destruction. Another impartial source was the memoirs of the United States Ambassador, Henry Morgenthau. Those deportations had been so effective as a method of destroying a minority group that they became a model for the mass removals of peoples to concentration camps, and their destruction by the Nazis, and provided a basis for qualifying that type of deportation as an international crime.

34. He agreed with the Special Rapporteur and Mr. Roucounas that mass compulsory deportation was in itself an international crime against humanity. At the same time, the Commission should not disregard the links between deportations and the crime of genocide. The Drafting Committee should take account of the fact that acts intended to extirpate whole populations on the grounds of nationality, race or religion could amount to genocide.

35. Draft articles 13 and 14 could, he thought, be referred to the Drafting Committee for further consideration in the light of the comments made by members of the Commission.

36. Mr. HAYES said that the Special Rapporteur's excellent seventh report (A/CN.4/419) dealt with a difficult and delicate aspect of a topic that was difficult and delicate in its entirety, and it did so with the Special Rapporteur's usual erudition and adroit formulation.

37. He appreciated the Special Rapporteur's analysis of the concept of crimes against humanity and the account of the history of the concept (*ibid.*, paras. 33-42), particularly its evolutionary separation from the concept of war crimes. The distinction drawn between those two kinds of crimes (*ibid.*, para. 40) was fully convincing and he endorsed the conclusion that "crimes against humanity" should be retained as a separate category, even if some of the acts involved could also fall into the category of war crimes.

38. His own preference was for the second alternative of draft article 13, and he believed that the expression "war crimes" should be retained because of its useful connotations as to the nature of the crimes. The second alternative, while also using the more modern expression "armed conflict", nevertheless preserved the historical basis for identification of the category of crimes in question. However, the general definition should be supplemented by a list, clearly identified as non-exhaustive and purely indicative. Material for such a list could be found in the various instruments in force.

39. The word "serious" should certainly be retained. The Commission had reached the conclusion that only serious offences should be regarded as crimes against the peace and security of mankind for inclusion in the draft code, a conclusion that logically applied within each of the categories of such crimes. He understood the view of those who believed that any breach of the relevant international rules must be regarded as a war crime, but at the same

time felt that only serious breaches should be included in the code itself. Lesser breaches should be left to national law and to domestic jurisdiction. That distinction owed something to the concept of a "grave breach" contained in the 1949 Geneva Conventions, but he agreed with the Special Rapporteur (*ibid.*, para. 19) that draft article 13 should use the expression "serious violation" rather than "grave breach", because the two concepts did not coincide.

40. With regard to draft article 14, he firmly supported the remarks made by Mr. Calero Rodrigues (2099th meeting) on the need to define crimes on the basis of acts rather than policies or practices, although acts could of course be the result of a policy and/or part of a practice, a factor that would make the act more serious. The definition of genocide in paragraph 1 supported that argument, since the word "act" was used in the introductory clause, and the list in subparagraphs (i) to (v) constituted a series of acts. The first alternative of paragraph 2, on *apartheid*, also met that argument, but he preferred the second alternative for other reasons. It would need to be adapted, yet the adaptation should not prove too difficult. Like others, he thought that the reference between square brackets to southern Africa should be deleted.

41. In paragraph 5, the word "other" before "inhuman acts" was very significant, since that formulation made it abundantly clear that genocide and the other crimes mentioned in the preceding paragraphs of the article were also inhuman acts. It would be interesting to learn in connection with those "other inhuman acts" whether the Special Rapporteur was satisfied that the text of paragraph 5 reflected fully the comments he made in his report (A/CN.4/419, paras. 44-46) and that those comments were sufficient to ensure that the provision was interpreted in accordance with the Special Rapporteur's concerns.

42. Paragraph 6 was a welcome addition to the list of crimes set out in the article. Finally, both articles 13 and 14 could be referred to the Drafting Committee for consideration in the light of the discussion.

43. Mr. TOMUSCHAT said that the lengthy debate made it easier to form an opinion on the question whether a list should be attached to the definition of war crimes. For his part, he believed that it was not the Commission's task to re-invent humanitarian law, which had taken shape immediately after the Second World War in the four Geneva Conventions of 1949,[21] supplemented in 1977 by Additional Protocols I and II.[22]

44. The first of those Protocols largely reflected the consensus of the community of States. There were, of course, a few difficult points of disagreement which had led a considerable number of States to refrain from ratifying Protocol I, but as far as he knew, article 85 was not one of the controversial provisions. It was in line with articles 129 and 130 of the Third Geneva Convention relative to the Treatment of Prisoners of War, as well as with articles 146 and 147 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. The key concept in all those instruments was that of a "grave" breach. The authors of the Geneva Conventions had made a thorough examination of the question before they had adopted the criterion of gravity, which had later been embodied explicitly in article 85, paragraph 5, of Additional Protocol I in order to characterize war crimes. There could be no question of broadening the concept of a "war crime". The draft code should cover only the most serious and gravest violations. Minor breaches, or technical violations of the laws of war, were not relevant for present purposes.

45. The question then arose as to how to define gravity. There were two ways of doing so, one being to base it on the nature of the crime, and the other being to take into account the consequences of the crime as they arose in the concrete circumstances of its commission. The Geneva Conventions and the Additional Protocols clearly adopted the first approach. Those instruments described a certain number of violations as "grave breaches" because of their characteristics. Moreover, the lists contained in those instruments were exhaustive. Lastly, the fact that a violation produced particularly serious consequences did not make it fall within the scope of the definition of "grave breaches".

46. Those ideas had perhaps been new by comparison with pre-existing law. Lauterpacht, in his *International Law*, did not mention "grave breaches" but defined war crimes as "criminal acts contrary to the laws of war",[23] a definition that was outmoded because the Geneva Conventions had since been ratified by nearly all States. It should be added that the ICJ, in its judgment in the *Nicaragua* case, had held that there existed customary rules or "general principles of humanitarian law to which the [Geneva] Conventions merely give specific expression".[24] As he saw it, it was therefore essential to bring the work on the draft code into line with the humanitarian law of the Geneva Conventions.

47. As to the question of means of warfare, the conventions on the subject did not contain any provisions on individual responsibility of members of the armed forces. That could be partly explained by the fact that some of the conventions had been concluded at a time when the responsibility of individuals under international law had not yet been developed. Such was the case of the Hague Declaration of 1899 concerning expanding bullets[25] and the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.[26] More recently, there were the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,[27] and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and the Protocols thereto.[28] It should be borne in mind that those instruments prohibited certain weapons in themselves, regardless of their consequences. The prohibition embodied

[21] See 2096th meeting, footnote 10.

[22] *Ibid.*, footnotes 11 and 17.

[23] L. Oppenheim, *International Law: A Treatise*, 7th ed., H. Lauterpacht, ed. (London, Longmans, Green, 1952), vol. II, *Disputes, War and Neutrality*, p. 567, para. 251.

[24] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, Judgment of 27 June 1986, *I.C.J. Reports 1986, p. 114, para. 220.*

[25] See J. B. Scott, *op. cit.* (2096th meeting, footnote 5), p. 227.

[26] League of Nations, *Treaty Series*, vol. XCIV, p. 65.

[27] United Nations, *Juridical Yearbook 1971* (Sales No. E.73.V.1), p. 118.

[28] United Nations, *Juridical Yearbook 1980* (Sales No. E.83.V.1), pp. 113 *et seq.*

in the 1925 Geneva Protocol would thus appear to be a good candidate for inclusion in the list of war crimes in the draft code. A difficulty arose, however, with regard to reprisals. If a prohibition on the use of certain weapons was included, it would also be necessary to frame provisions on countermeasures and their limitations. The task was an arduous one, but it had to be faced.

48. The Commission had the choice of a flexible or a rigid approach for the draft code. With a rigid approach, the code would not automatically allow for future developments. As a compromise solution, however, one could envisage listing all the acts described as grave breaches in the four Geneva Conventions and in article 85 of Additional Protocol I. The relevant provisions could be said to reflect customary law on the subject.

49. With reference to certain points discussed at length by Mr. Pawlak at the 2097th meeting, it was gratifying that the frontier problems between his own country and Poland had been settled by the Warsaw Agreement of 7 December 1970, which had normalized relations between the two countries. The Federal Republic of Germany had declared in that Agreement that it had no frontier claims against Poland. Nevertheless, the expulsion of the German populations to the east of the Oder-Neisse line constituted a clear example of "expulsion or forcible transfer of populations from their territory", as referred to in paragraph 4 (*a*) of draft article 14. He fully recognized the extent of human suffering inflicted by Hitler's Reich upon Poland and the Soviet Union: the populations of the then occupied territories had lived under arbitrary rule of the most ruthless kind. That did not, however, justify uprooting whole populations from the ancestral territories in which they had lived for centuries. The case was indeed one of expulsion, even if a different form of language had been employed in the Potsdam Agreement of 2 August 1945. Moreover, the territory from which those populations had been expelled had been German territory, and the Allied Powers could not dispose of it. As far as he was concerned, in a world which was marked by the prohibition of the use of force and by the right of peoples to self-determination, the forcible transfer of populations was one of the gravest crimes imaginable. He had not been convinced by the objections put forward by Mr. Reuter (2098th meeting): an exchange of populations by treaty between two States was something quite different from a forcible unilateral transfer.

50. In legal doctrine, many authors had asked themselves whether the rules of *jus cogens* were not identical to those underlying international crimes. Clearly, that was not the case. Two States could undertake action which, if it were carried out unilaterally by one of them, could amount to a breach of article 19 of part 1 of the draft articles on State responsibility.[29] Additionally, in the latter case the acting individuals could incur personal criminal responsibility under the code.

51. His views were supported by Principle VI of the Nürnberg Principles[30] formulated by the Commission, by articles 43 *et seq.* of the Regulations annexed to the 1907 Hague Convention,[31] by article 49 of the Fourth Geneva Convention, and by article 85, paragraph 4 (*a*), of Additional Protocol I. In that regard, he wished to reiterate his support for the idea of establishing an international criminal jurisdiction for the task of penalizing the crimes set out in the code. An impartial and objective adjudicating body was essential in order to avoid the same breach being given different treatment in different countries, each under its own laws. The whole code had a highly political content. In principle, that fact should not frighten jurists. A constitution, for example, was a political document. Nevertheless, in criminal law it was necessary to avoid excessive politicization. The Commission should endeavour to do so to the fullest possible extent. An international criminal court must adjudicate in complete objectivity. As administered by such a court, the code would become an instrument in full consonance with the requirements of the rule of law.

52. Mr. REUTER said he wished to explain that he in no way defended the expulsion or transfer of populations from their territories, which he regarded as abominable. Indeed, his own family had suffered on that score. His point had simply been that, if the Commission was to develop the idea of prohibiting such expulsions or transfers, as it must, he would never feel obliged, either morally or legally, to condemn certain international agreements which had been concluded in extremely serious and exceptional circumstances with the object of preserving the peace. Still less would he be able to condemn a federal State which, in order to achieve total peace and avoid bloodshed, felt compelled to encourage certain movements of population—under humane conditions of course. In order not to obstruct the work of the Commission, he was prepared to agree to a total condemnation, without exception, of such a practice. None the less, there were cases, albeit very limited, in which it was the lesser of two evils. Mr. Tomuschat was not convinced by his arguments, but he himself was unable to accept certain consequences of Mr. Tomuschat's analysis of treaties and custom.

53. The reason why he did not want a list of crimes was that he wanted more than a list, and perhaps more than one article. He did not want some makeshift legal provision, but a well-formulated one. The Commission could not discharge its duty simply by incorporating into the draft code certain terms, such as *apartheid* and genocide, and leaving it to the dictionary to provide the meaning, particularly if new crimes were to be covered, as appeared to be the deep desire of the majority of the members of the Commission.

54. He was grateful to Mr. Tomuschat for raising a serious problem that exercised him constantly, namely reprisals. It was a problem of which the Commission must at least take cognizance. His fear was that, when it came to the law of war, Governments now accepted the idea that they could react by using the same methods as those used against them. Draft article 14, however, was concerned with a different matter involving human rights and international judicial decisions under which the rule of reciprocity had not been recognized as an excuse. Supposing, for instance, that State A behaved towards a minority from State B in its territory in a manner that amounted to a crime against humanity, would State B have the right to act in the same way towards an ethnic minority of State A in its territory? Or supposing, again, that a State cut off the hands of prisoners of war in its custody, would the

[29] See 2096th meeting, footnote 19.

[30] *Ibid.*, footnote 14.

[31] *Ibid.*, footnote 5.

State from which the prisoners came have the right to do likewise? In both cases, the logical response seemed to be in the negative. He trusted that, in developing the list of crimes item by item, the Commission would consider the problem and decide whether it wished to solve it, or indeed could solve it.

55. Mr. BEESLEY commended the Special Rapporteur on his seventh report (A/CN.4/419) and on the impressive work done in a delicate and difficult area.

56. In considering the reports on the topic, he adopted two yardsticks, the first of which concerned the extent to which the draft articles and accompanying commentaries made a contribution to the existing system of international law and, in the present case, to humanitarian law and fundamental rights. On that basis, the seventh report shed considerable light on the subject. His second yardstick was concerned with how a particular article would be implemented in practice. There, however, his problem had always been that there was no appropriate existing tribunal to apply the law. Since it might be a long time before an international tribunal was set up, he inclined to the view that national tribunals should be used, but considered that they should have an international component, sitting with a judge from the accusing State, a judge from the State of the accused, and at least one or two more judges from other, different jurisdictions.

57. While he was persuaded by the Special Rapporteur's logic concerning the undesirability of a list of crimes, he had to confess to some illogicality in his own appreciation of the situation, since he would feel easier in his own mind with a list than with a generic definition, always provided, of course, that it was a non-exhaustive list to which any national tribunal could add as it chose.

58. Another troubling question was the extent to which the Commission could attempt to legislate on matters already dealt with in international conventions. By and large, he agreed that the Commission had not only a right, but virtually a duty to develop the law. However, it also had to be very careful and very precise about varying the wording of pre-existing texts.

59. An ancillary point concerned the distinction between the concept of war crimes and that of grave breaches within the meaning of the 1949 Geneva Conventions and Additional Protocol I thereto. He tended to agree with the Special Rapporteur that there was a distinction, although, as the Special Rapporteur pointed out (*ibid.*, para. 40), a single act could be both a war crime and a crime against humanity.

60. In his opinion, it was necessary to address attacks on property *per se*. For instance, all the housing in a given area might be destroyed, or such vital necessities as the entire electrical or water system. He had no doubt that attacks on the environment could in certain circumstances constitute a very grave crime—a crime against humanity rather than a war crime as such, although he would not rule out the latter.

61. The two alternatives of draft article 13 proposed by the Special Rapporteur were not really mutually exclusive, and possibly the Drafting Committee might wish to produce a text that incorporated paragraph (*b*) of the first alternative with paragraphs (*a*) and (*b*) of the second. In so doing, it would have to deal with the distinction between war crimes and grave breaches of humanitarian law, although that was not necessarily a disadvantage. He was reluctant to accept the introduction of a subjective term like "serious", even though he was well aware of the history of the term "grave breach", and tended to favour some term such as "deliberate" or "recklessly negligent". The concept of seriousness itself should, however, be built into the text of the commentary, it being left to the tribunal, if the Commission agreed on one, to determine guilt or innocence and the penalty to be imposed. Clearly, it was no longer possible to refer simply to the law of The Hague and the law of Geneva. There was at once a merger and a distinction to be borne in mind, and article 13 could perhaps be redrafted to reflect that.

62. As to draft article 14, he agreed that both the concept of genocide and the term itself should be included. The same applied to the provision on *apartheid*, although it was not wise to refer specifically to a particular country which had originated and practised the concept so destructively for so many years. The Commission must legislate for the future, not just for the past and the present. Further thought should be given to the extent to which the article used a pre-existing text and, in particular, the Commission should be meticulous when using definitions taken from existing instruments.

63. He tended to favour the second alternative of paragraph 2, even though he had reservations about the end-product because of the dangers of incorporating an exhaustive list, to which reference had already been made.

64. Lastly, he remained of the view that the concept of *mens rea* as utilized in English common law was important and continued to think, particularly in the light of Mr. Barsegov's remarks, that motives were not at issue. The intent to commit a crime of so serious a nature that it warranted inclusion in the draft code was the important thing. The differences among members of the Commission in that regard appeared to have been narrowed.

65. Mr. PAWLAK said that he, like Mr. Tomuschat, welcomed the Agreement of 7 December 1970 between Poland and the Federal Republic of Germany as an important factor for security in Europe and bilateral relations between the two countries. However, he felt bound to clarify a few points. In the first place, the reference by Mr. Tomuschat (2096th meeting) to the transfer of the German population from Poland to Germany after the Second World War was not relevant in the context of paragraph 4 of draft article 14. As he himself had explained (2097th meeting), that transfer had taken place in the framework of the fundamental objectives of the Potsdam Agreement of 2 August 1945, under which there had been an obligation to repatriate the German population from Poland.

66. Secondly, the displacement or transfer of a population as part of the settlement of border problems was not to be regarded as a reprisal. It was a matter of international agreement whereby, following a war, one country ceded part of its territory to another.

67. Thirdly, the population transfer under the Potsdam Agreement had not been unlawful, having been conducted under the authority and control of the Allied Powers, which had been required to report back to their Governments.

68. Lastly, the Agreement of 7 December 1970 had been the second Polish/German treaty on border issues, the first having been signed on 6 July 1950 between Poland and the German Democratic Republic. Both treaties referred to the existing border between Poland and Germany as having been established by the Potsdam Agreement.

The meeting rose at 1.05 p.m.

2101st MEETING

Friday, 12 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/411,[2] A/CN.4/419,[3] A/CN.4/L.431, sect. D, ILC(XLI)/Conf.Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 13 (War crimes) *and*

ARTICLE 14 (Crimes against humanity)[4] (*continued*)

1. Mr. JACOVIDES said that, with the conclusion of the draft code, the Commission would have provided the international community with an instrument of deterrence and punishment.

2. With regard to draft article 13, the Special Rapporteur had indicated that the problems which arose related to the definition of war crimes, to terminology and to the concept of gravity. He agreed that a general definition of war crimes should be laid down and that it should be left to judges to decide on its application in each particular case in the light of the evolution and progressive development of the law. The law of war derived from certain customs and practices which had gradually gained recognition, as well as from the general principles of justice as recognized by jurists and endorsed by the practice of military courts. Hence, it was not a static law, but a law which, through a process of continual adaptation, followed the needs of a changing world; treaties, for the most part, were no more than an expression and definition of the principles of law that already existed.

3. With regard to terminology, he considered that the choice between "war" and "armed conflict" was less clear. Since war had, in theory, been outlawed with the adoption of the rules of *jus cogens* enshrined in the Charter of the United Nations and various other international instruments, the expression "armed conflict" would be more in keeping with present-day terminology. None the less, the expression "laws or customs of war", which was found in many international conventions in force, as well as in national laws, should not be discarded, on the understanding that its use did not sanction war.

4. He commended the Special Rapporteur for having adopted the concept of gravity in the definition of war crimes. He considered that, like the 1949 Geneva Conventions and Additional Protocol I thereto, the draft code should make a distinction between grave breaches and other breaches and that, if the code was to be effective, it should cover only the former. That was one of the reasons why many members had insisted that, in the English title of the topic, the word "crimes" should be used instead of "offences". In his view, therefore, the square brackets in paragraph (*a*) of the first alternative of article 13 should be removed.

5. In general, however, the second alternative of article 13 seemed preferable to him, because it used terminology that was more modern and closer to humanitarian law as codified.

6. Crimes against humanity, dealt with in draft article 14, had initially been linked to a state of belligerency but were now separate from war crimes. No doubt the same act could be both a war crime and a crime against humanity, but the concept of a crime against humanity was broader, since war crimes were committed only in time of war and as between belligerents.

7. With regard to inhuman acts, the Special Rapporteur had, in his seventh report (A/CN.4/419, paras. 43 *et seq.*), rightly drawn attention to the many criteria at issue—moral, ideological, methodological and nationalistic, for instance—in the case of attacks against persons and attacks against property and, in particular, against monuments of historical, architectural or artistic significance, such as those classified by UNESCO as belonging to the heritage of mankind. Indeed, there were already conventions on the protection in wartime and peacetime of artistic and scientific institutions and historical monuments. Cyprus had none the less had experience, as a result of foreign occupation, of the systematic destruction of its cultural heritage, when priceless antiques and objects of religious significance had been plundered and sold on the black market.

8. He was in general agreement with the list of crimes against humanity set out in article 14, but reserved the right to revert to the matter in more detail. Genocide was such a crime, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide, which could be

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] For the texts, see 2096th meeting, para. 2.

regarded as declaratory of customary law. Similarly, *apartheid* and, in general, any system of government based on racial, ethnic or religious discrimination, clearly fell into that category of crimes. He trusted that there would be a change in the system of *apartheid* as practised in South Africa, and recent developments in Namibia were certainly welcome. Since it was to be feared that similar systems of government would be established in other parts of the world, however, he felt that the first alternative of paragraph 2, which was short and drafted in general terms, was more suitable for a code of general application.

9. Slavery and other forms of bondage were, of course, crimes *jure gentium* and, in many cases, were covered by ordinary law; but where a State was involved, slavery could be included as a crime against humanity. The same applied to the crimes dealt with in paragraph 4, which had no place in international life or international law, but of which the Cypriots, like certain peoples in the Middle East and southern Africa, had had bitter experience. Lastly, it was perhaps necessary to be more specific with regard to the acts referred to in paragraphs 5 and 6.

10. The Commission was nearing the end of its undertaking. He was grateful to the Special Rapporteur for the efforts he had made in that regard and trusted that the Commission's collective endeavour would be crowned with success. He welcomed such signs of improvement in the international climate as the revitalization of the United Nations, the recognition of the worth of the United Nations peace-keeping forces, the extension of the jurisdiction of the ICJ and the increased co-operation between the super-Powers in combating terrorism, drug trafficking and pollution, all of which could have a positive effect on the Commission's contribution to building a more effective international legal order.

11. Mr. EIRIKSSON said that work on the draft code was sufficiently advanced to allow two intermediate conclusions to be drawn. First, the final result would not be a code of the kind found in national jurisdictions: there would be imperfections and approximations and some degree of universality and scope would have to be sacrificed for the sake of acceptability. Paragraph 1 of article 4 (Obligation to try or extradite),[5] for example, presupposed the agreement of States: some mechanism might therefore have to be provided to ensure that minor points did not prevent such agreement. In that connection, the model of the human rights conventions might be borne in mind.

12. The second conclusion was that the drafting of the articles would be better if the consequences of the crimes included were specified in the text itself. In other words, there was no need for the characterization of crimes to be polemic, declaratory or condemnatory, whatever the moral and political gains perceived.

13. Referring to the question of the list of war crimes which might or might not be included in draft article 13, he said that he had never been in favour of that solution. Moreover, he had earlier proposed that aggression should continue to be defined in the terms now employed in paragraph 2 of article 12 (Aggression).[6]

14. With regard to the characterization of crimes, the text did not clearly indicate the consequences resulting from the distinction between a crime against peace, a crime against humanity and a war crime. For reasons relating to the drafting technique used in the code, that differentiation could be retained for headings of sub-chapters, but it should not appear in the definitions.

15. As to the definitions and in general terms, he said that he shared the views of those who believed that the Commission should be wary in its work of prejudicing the body of law already existing outside the code.

16. On another general point, he said that a distinction could be drawn between crimes which had names—and when they did, they should be used—and the others. Accordingly, on the one hand, there were genocide, slavery and aggression and, on the other, the crimes referred to in draft article 14, paragraphs 4, 5 and 6. The debate had shown that the expression "war crimes" fell between those categories. As for *apartheid*, it might perhaps be necessary to avoid using the word itself as the generic term for the crime it represented. In fact, the policy of *apartheid* would soon be eradicated, no doubt forever. A more general term should therefore be found.

17. For all those reasons, he proposed that article 13 should appear in a sub-chapter entitled "War crimes" and read:

> "The present Code applies to any serious violation of the rules of international law applicable in armed conflict."

That text was based on the wording of paragraph (*a*) of the second alternative proposed by the Special Rapporteur. He was not sure whether paragraph (*b*) of the second alternative was necessary and its content could be reflected in the commentary.

18. Draft article 14 could be divided into eight separate articles in a sub-chapter entitled "Crimes against humanity". The first would read:

> "The present Code applies to genocide. For the purposes of the present Code, 'genocide' means any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such."

The second would read:

> "The present Code applies to the institution of any system of government based on racial, ethnic or religious discrimination."

The third would read:

> "The present Code applies to slavery and all other institutions and practices similar to slavery."

The expression "practices similar to slavery" might have to be re-examined, but in any case the term "forced labour" was inappropriate.

19. The three crimes referred to in paragraph 4 of article 14 would then follow, divided into three separate articles, each introduced by the words: "The present Code applies to . . . ". The following article, the seventh, would read:

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[5] *Yearbook . . . 1988*, vol. II (Part Two), p. 67.

[6] *Ibid.*, p. 71.

"The present Code applies to all other inhuman acts against any population or against individuals on social, political, racial, religious or cultural grounds."

The eighth and last article would read:

"The present Code applies to any serious and intentional harm to the human environment."

20. To complete the new arrangement of the text, article 12 (Aggression), provisionally adopted at the previous session, would appear in a sub-chapter headed "Crimes against peace" and be worded as follows:

"The present Code applies to aggression. For the purposes of the present Code, 'aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations."

21. In conclusion, he said that draft articles 13 and 14 should be referred to the Drafting Committee.

22. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur's seventh report (A/CN.4/419), which took into consideration many suggestions made in the Commission and in the Sixth Committee of the General Assembly, would undoubtedly expedite work on the draft code.

23. The code was being understood more and more as an essential element of the United Nations security system, which was built on the prohibition of the threat or use of force and the co-operation of States in the prevention and settlement of disputes and situations which might threaten international peace and security. The development of international criminal law in order to co-ordinate the policy of States in their fight against serious international crimes was part of that co-operation, particularly in an increasingly interdependent world where States had become vulnerable to acts of foreign interference and large-scale international crime and where the enforcement of the international rules essential for the survival of mankind had become a vital necessity. The code could help to strengthen the common basic values of the international community and to establish an international legal order based on the rule of law.

24. After expressing the view that it would be best to have a separate article for each crime, he said that he too preferred the second alternative of draft article 13, which referred to the rules of international law applicable in armed conflict. That formula had several advantages. It avoided the term "war", which often gave rise to problems. It did not introduce the concept of "international or non-international conflict", which was open to controversial interpretations and might raise the question of the extent to which a crime committed during an internal armed conflict could be categorized as a war crime. It simply stated the essential point, presupposing in paragraph (*a*) a decision by the parties or a judge that certain rules of international law were applicable to the armed conflict in question. For that reason, it would be better not to add a paragraph defining armed conflict. That was also why he would prefer not to use the term "grave breaches", which bore the imprint of the 1949 Geneva Conventions and did not cover all war crimes or even all serious war crimes. On the other hand, by referring to "serious violations" of the rules of international law applicable in armed conflicts, namely the rules contained in conventions, rules of customary law or rules agreed upon by the parties to the conflict, all war crimes could be covered and, at the same time, be restricted to the most serious violations within the meaning of the code.

25. The first part of the second alternative would be sufficient to determine the scope of the article and there was no reason for paragraph (*a*) to be clarified by paragraph (*b*). In fact, the rules of international law applicable in an armed conflict might derive from different sources and depend on the nature of the armed conflict in question. Some rules, like the Martens clause (*ibid.*, para. 5), might even have been accepted in the form of generally recognized principles. But in any case, rules, and not merely principles, must serve as the basis for penal law. The term "rules" thus also applied to those "principles".

26. The criterion of gravity was essential. To avoid any risk of confusion with established national and international standards concerning war crimes, the Commission must clearly define which kinds of war crimes fell within the ambit of the code.

27. Article 13 should begin with a general definition containing three elements, namely the applicable rules of international law, armed conflict and the gravity of violations, and should be accompanied by a list of crimes. In that connection, it would be useful if Mr. Yankov's suggestion (2098th meeting, para. 16) could be made available to the Commission in writing. He also agreed with all the arguments which had been put forward in favour of such a list. Since the Commission was dealing with penal law, it could not be content with a very general definition, with cross-references to other legal documents or to customary law or with a set of examples. It had to be specific in describing the nature or type of the violations it had in mind. Whether cases were ultimately to be decided by national courts or by an international tribunal, there could be no question of leaving everything to the discretion of judges. The list therefore had to be exhaustive as far as the types of violation were concerned, but of course it could not be exhaustive with regard to the acts which might be committed. For that purpose, the Commission could follow the model of the Charter of the Nürnberg Tribunal, the 1949 Geneva Conventions or Additional Protocol I thereto, without specifically referring to those instruments.

28. He suggested adding to paragraph (*a*) of the second alternative a new paragraph consisting of three subparagraphs: the first dealing with crimes against protected persons (the wounded, the sick, civilians, prisoners of war, *parlementaires*, soldiers *hors de combat*); the second dealing with the destruction of protected goods, the term "goods" being preferable to "property" because it was much broader; and the third dealing with the unlawful use of certain weapons and methods of warfare. Each of those subparagraphs would be accompanied by an indicative list of the acts concerned. He had formulated a text along those lines and would give it to the Special Rapporteur.

29. He thought it was also necessary to include an article making it clear that the use of weapons of mass destruction, in particular nuclear weapons, constituted a serious war crime or, more correctly, a crime against humanity. That, of course, was a controversial question. In 1981, however,

the General Assembly had adopted the Declaration on the Prevention of Nuclear Catastrophe,[7] proclaiming that States and statesmen that resorted first to the use of nuclear weapons would be committing the gravest crime against humanity, and that there would never be any justification or pardon for statesmen who took the decision to be the first to use nuclear weapons. The Commission should support that position by drafting a special article for that type of crime; it should approach that important question mindful of its responsibility to contribute to the progressive development and codification of international law. That responsibility, so often referred to when the Commission was dealing with international liability for acts not prohibited by international law, with watercourses or with the environment, must not be forgotten when it was faced with a problem which was no less vital for the survival of mankind than the protection of the environment.

30. There appeared to be a fairly general consensus on the question of crimes against humanity. Genocide and *apartheid*, in particular, must be included in the draft code. In both cases, the Commission should not refer to the earlier conventions, but should reproduce their substance in describing the crimes concerned. It must also be careful not to intrude upon the scope of application of those instruments. The provision dealing with the crime of *apartheid* should not be restricted to South Africa, since the institution of *apartheid* might appear in other parts of the world. He therefore preferred the second alternative of paragraph 2 of draft article 14.

31. Paragraph 3 could be improved by a stricter form of wording. In the International Covenant on Civil and Political Rights,[8] slavery and servitude were not dealt with on the same footing as forced labour. Article 8, paragraph 3, of the Covenant showed that the expression "forced labour" could not be used without a more specific determination. In the case of slavery and servitude, as with war crimes and other crimes against humanity, the criminal act could consist of ordering the act to be committed or actually committing it; but it could also have a broader connotation and, like the crime of *apartheid*, it could originate in legislation. It might therefore be necessary to extend the provision to refer to any measures, including legislative measures, which were designed to legalize or to justify such practices.

32. He agreed with the approach adopted by the Special Rapporteur in paragraph 4, but thought it would be useful to combine subparagraph (*b*), whose wording might be too broad, with subparagraph (*c*). Moreover, the scope of the provision should be confined to occupied territories and care should be taken to formulate it in such a way that it could not be invoked to shield a population which had acted as a fifth column in planning a war of aggression from the consequences deriving from the responsibility of the aggressor State.

33. He supported the idea that the concept of a "vital human asset" should include objects deemed to belong to the cultural heritage of mankind. Since the aim was not so much to protect specific cultural goods as to protect mankind from the loss of its heritage, however, paragraph 6 should be worded more precisely. In that connection, he agreed with Mr. Barsegov's comments (2097th meeting) on the term "humanity". The same was true of the environment. It had been suggested that the wording of paragraph 6 should be brought into line with that of article 19 of part 1 of the draft articles on State responsibility.[9] Account should also be taken of article 55 of Additional Protocol I[10] to the Geneva Conventions, which sought to protect the natural environment against widespread, long-term and severe damage liable to prejudice the health or survival of the population. The wording should focus on persons in posts of political, military or economic responsibility, who, by ordering, committing or bringing about the commission of a serious violation of an obligation incumbent on the State, caused widespread, long-term and severe damage to the human environment.

34. Turning to the difficult question of the implementation of the code, he said that the Commission should look for solutions which were manageable, likely to be accepted by States and could be successfully applied. Those who believed that the code would be a useful instrument were necessarily interested in its effective implementation. It would be useless to look for ideal solutions which had no chance of being achieved in the near future: that would prevent the code from ever coming into force. What was needed was a realistic approach based on existing international law and State practice.

35. At its previous session, the Commission had provisionally adopted article 4 (Obligation to try or extradite),[11] on the assumption that the code would be applied by national courts. That had been the most feasible approach at that stage. In its commentary to the article, however, the Commission had also made it clear that it did not wish to rule out other approaches. It had stated, in connection with paragraph 3 of article 4, that "the jurisdictional solution adopted in article 4 would not prevent the Commission from dealing, in due course, with the formulation of the statute of an international criminal court".[12] The General Assembly had taken note of that approach and it was clear from its discussions that the international community was in fact prepared to consider the practical implementation of an international code of crimes against the peace and security of mankind. For the first time in the past six years, the Commission had received at least a partial answer to the question it had repeatedly asked on the implementation of the code. In resolution 43/164 of 9 December 1988, the General Assembly had encouraged it "to explore further all possible alternatives on the question [of the judicial authority to be assigned for the implementation of the provisions of the code]" (para. 2).

36. Unfortunately, many people seemed to believe that the Commission had only two alternatives: the universal jurisdiction of national courts or the exclusive jurisdiction of an international tribunal. Sometimes there was mention of the idea of special or *ad hoc* tribunals, which might, of course, raise other problems. Few States had realized that, in its commentary to article 4, the Commission had also

[7] General Assembly resolution 36/100 of 9 December 1981.

[8] United Nations, *Treaty Series*, vol. 999, p. 171.

[9] See 2096th meeting, footnote 19.

[10] *Ibid.*, footnote 11.

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

[12] *Ibid.*, p. 68, para. (5) of the commentary.

referred to another possibility, namely "to have an international court coexist with national courts".[13]

37. In his view, it was reasonable to start with universal jurisdiction, since that was the assumption underlying article 4. However, that solution—itself not a new one—left some problems unresolved. Intensive co-operation would be needed among the States concerned in order to ensure that criminals would not go unpunished and in order to harmonize the decisions of national courts. At a later stage in its work, the Commission might therefore have to add to the draft some more specific provisions on the implementation of the code, for example by considering the possibility of a combination of the universal jurisdiction of national courts and the jurisdiction of an international criminal court.

38. Some elements of such an approach already existed in the form of the revised draft statute for an international criminal court prepared by the 1953 Committee on International Criminal Jurisdiction[14] and the Statute for an International Criminal Court adopted by ILA in 1984.[15] Those texts explicitly provided not for the exclusive jurisdiction of an international court, but for the concurrent jurisdiction of national courts and an international court, and did not treat the two as mutually exclusive alternatives. Under article 23 of the ILA text, for example, a State would be at liberty to decide whether to try a suspect in its national court or to refer him to the international criminal court.

39. While solving some of the problems of universal jurisdiction, the latter proposal unfortunately introduced an element of insecurity by giving the State concerned a choice in the matter. Moreover, it did not solve the problems connected with an international court of first instance. It might therefore be wiser to combine the positive aspects of universal jurisdiction with those of an international criminal tribunal by considering the establishment of an international criminal court as a court of review. The existence of an international court having the power to review final judgments of national courts would in any event solve most of the problems to which he had just referred. Access to such a court should be limited to the State whose national had been tried by a foreign court, and the State on whose territory or against which the offence had been committed when the offender had been tried by another State. Whenever one of those two States considered that the trial abroad had not been in conformity with the code, it could appeal to the international court, whose decision would be final. A national court seized of a case that came under the code might also be allowed to request a binding opinion from the international court on a question of international criminal law.

40. Such a solution, which he submitted for the Commission's consideration, would have the advantage of relying on existing machinery at the national level. It would make it much easier for States to accept the establishment of an international criminal court; it would avoid any unnecessary extradition of offenders; and it would not require a public prosecutor or prosecution chamber or the establishment of an international prison and the training of international law enforcement staff. At the same time, an international criminal court with powers of review would substantially strengthen objectivity and impartiality in the administration of justice and would harmonize the case-law of national courts. It would become an effective remedy for the States concerned against the improper administration or misuse of justice by national courts. Lastly, it would represent a feasible move towards the establishment of an international criminal court proper.

41. Such a flexible approach would allow for the effective implementation of the code, promote mutual co-operation by States in combating international crime and ensure the enforcement of the basic rules of international law. It would thus strengthen the international legal order and the rule of law in international relations.

42. In conclusion, he stressed once again that there was more than one possible solution, not just the single alternative of universal jurisdiction: there were many other approaches which could be combined with universal jurisdiction so as to ensure the objective, fair and equitable application of the code.

43. Mr. KOROMA, referring to paragraph 23 of the Special Rapporteur's seventh report (A/CN.4/419), said that it was inappropriate to give grievous bodily harm as an example of a correctional offence because, in common law at least, it was a very serious offence punishable by a harsh penalty. Perhaps that was only a translation problem, but it should be looked into in any case.

44. Mr. Graefrath's comments on the question of jurisdiction offered much food for thought, but for the time being he would ask only one question: assuming that the international criminal court was to be a court of review, could it be seized by an individual who had been tried by a court of the State of which he was a national and who had exhausted all local remedies?

45. With regard to the inclusion of the concept of gravity in the definition of war crimes and to the types of offences to be characterized as such, it would be better to wait until the Special Rapporteur had summed up the discussion before coming back to that question.

46. Mr. FRANCIS said that he basically agreed with Mr. Díaz González's proposal (2100th meeting) that drug trafficking should be included in the draft code as a crime against humanity. In his own earlier statement (2099th meeting), he had intended to raise the question of drug trafficking, which was of crucial importance not only for third world countries, but for all countries of the world. He had, however, decided to wait to hold consultations, particularly with the members of the Commission from Latin America, but also with Mr. McCaffrey, who was due to arrive shortly, and with Mr. Reuter. Would the Commission revert to that question?

47. The CHAIRMAN assured Mr. Francis that it would do so.

48. Mr. REUTER noted that Mr. Graefrath had seemed to rule out the idea that the Commission should take a stand on the question of countermeasures or reprisals. In that connection, he himself had stated that, if the Commission did not discuss that question, it would have to say so unambiguously and indicate that it did not want to, or could

[13] *Ibid*, p. 67, para (1) of the commentary.

[14] "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.

[15] ILA, *Report of the Sixty-first Conference, Paris, 1984* (London, 1985), p. 257.

not, solve that problem. One of the reasons why he could not agree to the attribution of responsibility for the crime of the use of nuclear weapons or of weapons of mass destruction to the first user was that that would be tantamount to deciding indirectly on the question of reprisals.

49. Noting that Mr. Barsegov (2100th meeting) and other members had raised the question of motive and intent, he warned the Commission against the danger of getting lost in a theoretical discussion on that question. The problem in that regard stemmed from the fact that the terms used in the various national legal languages were almost untranslatable into other languages, because they corresponded to specific concepts in a particular legal system. The Commission nevertheless had to decide, in respect of each crime to be included in the draft code, whether psychological factors should or should not form part of the definition of the crime. It could not formulate any general rules on that point. There had, for example, been cases of genocide caused by unintentional bacteriological contamination: in such cases, it was possible to envisage ordinary civil liability, but certainly not criminal responsibility. In the case of war crimes, there were also problems, such as that of military necessity, which the Commission had no right to ignore.

50. Mr. OGISO said it was his understanding that the Special Rapporteur was not particularly keen to submit a list of crimes to supplement draft article 13. If he nevertheless did so in order to comply with the wish of several members of the Commission, it would be better not to have the text go directly to the Drafting Committee, but to have the Commission consider it in plenary so that members could at least make some general comments on it.

51. The CHAIRMAN said that, if the list was submitted directly in plenary, the discussion on the agenda item under consideration would have to be reopened. He therefore suggested that the text to be drafted should simply be distributed to all members of the Commission, who would thus be able to make their comments to the Drafting Committee.

52. Mr. THIAM (Special Rapporteur) said that he had no firm position on the question of the list. He had himself made a number of proposals and had even put forward a draft list in connection with which the use of nuclear weapons had given rise to differences of opinion. If there was to be a list, he would therefore amend it until a consensus had been reached. In order not to upset the timetable and programme of work, that list could be referred to the Drafting Committee, which would prepare a provisional text and transmit it to the Commission for its comments.

53. Mr. TOMUSCHAT said he, too, thought that the preparation of the list would be a very delicate task and that it was only in plenary that each member of the Commission would be able to state his views. It might be advisable for the Special Rapporteur to prepare an addendum to his report to deal with that particular point.

54. The CHAIRMAN said that, in the light of the discussion, he would ask the Special Rapporteur to submit a draft indicative list of war crimes and that time would be found for every member who wished to do so to express his opinion on it the following week in plenary.

It was so agreed.

55. After an exchange of views on the dates of distribution of the summary records of the Commission's meetings, the CHAIRMAN said he would take it that the Commission agreed to request Mr. Fleischhauer, Under-Secretary-General, the Legal Counsel, to ask the technical services of the United Nations Office at Geneva to speed up the publication of those documents and, in particular, at Mr. Barsegov's request, that of the Russian version of the summary records of the meetings at which Mr. Barsegov had spoken.

It was so agreed.

56. The CHAIRMAN proposed that the Commission should adjourn to allow the Drafting Committee to meet.

It was so agreed.

The meeting rose at 11.30 a.m.

2102nd MEETING

Tuesday, 16 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/411,[2] A/CN.4/419,[3] A/CN.4/L.431, sect. D, ILC(XLI)/Conf.Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 13 (War crimes)[4] (*continued*)

ARTICLE 14 (Crimes against humanity)[5] (*concluded*)

1. Mr. THIAM (Special Rapporteur), summing up the discussion, thanked members for their valuable contributions to a rich debate. Commenting first on a minor point

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] For the text, see 2096th meeting, para. 2.

[5] For the text, *ibid.*

concerned more with drafting than with substance, he said he agreed that each crime should in principle form the subject of a separate article and understood that a decision to that effect had been reached in the Drafting Committee, but the matter should be dealt with after points of substance had been settled.

2. The discussion of draft article 13, on war crimes, had focused on the question of definition and on the concept of gravity, to which he would therefore confine his remarks. It was apparent from the debate that differences subsisted between those who favoured a general definition and those who favoured a list of crimes which, if not exhaustive, was at least indicative. The former took the view that, since war crimes were already the subject of codification and since many conventions stated the positive law in the matter, a list of crimes that simply reflected the existing law would be of little use. It might also be somewhat hazardous for the Commission to embark on progressive development of the law, particularly when certain matters had yet to be agreed between States. That, however, was a point to be resolved by the Commission. It had likewise been said that a non-exhaustive list of crimes would be of little use because it would not be in conformity with the principle *nullum crimen sine lege*. In fact, such a list had never been drawn up and was impossible to devise: hence the Martens clause contained in the 1907 Hague Convention and reproduced in Additional Protocol I to the 1949 Geneva Conventions (see A/CN.4/419, para. 5). Those were the reasons which, he believed, had persuaded some members that it would be better to be content with a general definition.

3. Other members took the view that a general definition would not suffice and that a few indicative examples should be given to provide the court with an idea of the profile of a war crime. The discussion on that point, however, would be never-ending. For a long time, there had been no satisfactory attempt at compiling an exhaustive list of war crimes; there had only been conventions on specific questions, such as the 1868 Declaration of St. Petersburg, the 1899 Hague Declaration on expanding (dumdum) bullets, the 1922 Washington Treaty and the 1925 Geneva Protocol (*ibid.*, footnote 21). Only much later had there been any attempt to arrive at a general codification of the law of war as reflected, for instance, in the 1907 Hague Convention, the 1949 Geneva Conventions and the Additional Protocols thereto. Those conventions none the less differed in the methods they employed. The 1907 Hague Convention, for example, did not lay down a general definition but merely set forth a non-exhaustive list and referred to the laws and customs of war. The Charter of the Nürnberg Tribunal referred to the laws or customs of war and set forth a non-exhaustive list, while the Charter of the Tokyo Tribunal covered only violations of the laws or customs of war, without incorporating any list. Thus two instruments, drawn up at the same time and for the same purpose, had employed totally different methods.

4. Moreover, the lists incorporated in the Geneva Conventions and the Additional Protocols pertained only to humanitarian law and said nothing whatever about other war crimes, such as the unlawful use of weapons, repeating the very old provision to the effect that there was no unlimited right with respect to the use of the methods and means of warfare. Once a list was involved, the matter became more complicated. It was easy to enumerate the violations of humanitarian law, by referring to existing Conventions, but it was much more difficult to list crimes pertaining to the unlawful use of weapons, for new weapons were constantly being invented. Hence ICRC had expressly pointed out that Additional Protocol I contained no formal prohibition on specific weapons.

5. Some of those who advocated a non-exhaustive list had referred to the list prepared by the International Association for Penal Law. As he had explained in earlier reports, he had felt unable to follow that list because it referred solely to humanitarian law, and war crimes, of course, went beyond humanitarian law.

6. His own position had changed. In the first draft, as submitted in his fourth report in 1986, he had proposed two alternatives for article 13.[6] The second alternative, unlike the first, had contained a list as well as a general definition. In examining that list, the Commission had been confronted with the problem of the use of nuclear weapons and had spent a great deal of time considering whether or not to refer to that type of weapon. He had therefore decided to draw up a list in which the use of nuclear weapons was mentioned between brackets; but that too had incurred strong opposition on the part of some members. Having therefore decided that it would be preferable to leave nuclear weapons aside, he had introduced the present draft, which did not include a list.

7. The positions of members on the concept of gravity were quite clear-cut. Some considered that it should not come into play as a distinguishing factor between the various war crimes. Mr. Arangio-Ruiz (2097th meeting) thought it important not to shatter the well-known principle of the indivisibility of the concept of war crimes and had stressed that that was what he had always been taught. The world had changed, however, and the concept of gravity had long been used in the definition of war crimes. For example, the 1949 Geneva Conventions had introduced the concept of a grave breach and had drawn a distinction: States were required to bring proceedings only in the case of grave breaches, it being left to their discretion to do so in the case of other breaches. Article 19 of part 1 of the draft articles on State responsibility[7] also made a distinction between crimes and delicts on the basis of their seriousness, in which connection he would draw attention in particular to paragraph 3 of that article. Article 19 had yet to be finally adopted, but the element of gravity was already part of positive law since there were conventions in force that differentiated between serious breaches and other breaches. As Mr. Francis (2099th meeting) had rightly pointed out, it was not possible to condemn with equal severity someone who deprived a soldier of food for a day and someone who subjected that soldier to torture.

8. Another argument, invoked by Mr. Koroma (2097th meeting), was that it was for the judge, not for the law, to make a finding as to the gravity of an act. In that connection, the definition of an act and the characterization of an act were not the same. Definition consisted of a description of the specific features of the act. Characterization was something different. In domestic law it was the legislator who defined and distinguished between, say, involuntary homicide, which involved the commission of an act that caused death without intent, murder, which involved the commission of an act that caused death with intent,

[6] See 2096th meeting, footnote 4.

[7] *Ibid.*, footnote 19.

and killing (*assassinat*), which involved premeditation. When a person was prosecuted, it was the court which characterized the act in question and, on the basis of that distinction, classified it within one of those categories. Thus gravity itself was determined by the legislator. The position was no different in international law. Genocide and *apartheid* were defined in conventions and it would be for the international court, or any other court to which a case was referred, to decide within which of the categories in the conventions the act fell. It was a delicate issue, but the Commission must try to make the necessary distinctions.

9. On the question of terminology, there was more or less general agreement that the expression "war crimes" should be retained in the title of article 13 and the majority of members favoured the second alternative of the article. Some, including Mr. Ogiso (2099th meeting) and Mr. Beesley (2100th meeting), had suggested that the two alternatives might be combined. That, again, was a point for the Commission to decide.

10. As to draft article 14, on crimes against humanity, he had explained in his fourth report[8] that the word "humanity" should be understood not in the sense of philanthropy or charity but rather in the sense of respect for human values and of concern to protect mankind against barbarity. It was necessary to ensure that humanity did not fall into moral degradation and to defend the values on which universal civilization was based. Mr. Barsegov (2097th meeting) had rightly drawn attention to the joint declaration of May 1915 by the Governments of France, Great Britain and Russia in connection with the massacres perpetrated by the Ottoman Government against the Armenian minority. That declaration was important not only because it used the expression "crimes against humanity", but also because it introduced into international law for the first time the notion of criminal responsibility, including that of individuals. The declaration had not, however, introduced the notion of crimes against humanity into positive law, for at the Paris Peace Conference the expression "crimes against humanity" had been opposed by the Government of the United States of America and consequently dropped. Only after the Second World War, and because of the crimes committed during that war, had the United States agreed to the use of that expression at the London Conference on war crimes.

11. Mr. Barsegov had also referred (2100th meeting) to the distinction between intent and motive—a distinction which, as Mr. Reuter (2101st meeting) had suggested, was perhaps chiefly a question of the different terminology used by various legal systems. Under the system with which he was most familiar, the distinction between intent and motive was an easy one. Intent meant acting with awareness and resolve, and intending the consequences of one's acts. He agreed entirely that intent was a component element of all crimes, whether crimes against humanity or ordinary crimes. But motive was a different matter. It involved a sentiment and, as such, constituted an element of differentiation between crimes against humanity and ordinary crimes—unlike intent, which could not serve as a basis of distinction inasmuch as all crimes presupposed a guilty intent. So far as motive was concerned, there were, for instance, crimes committed for gain, crimes of passion, and crimes committed for the basest of motives: it was precisely the latter, committed as they were because of racial, religious or political hatred, that were covered by the draft code. For a crime to be characterized as a crime against humanity, it had to violate a deep-rooted sentiment of humanity. That, in his view, was the criterion for any distinction between intent and motive. Once again, however, it would be for the Drafting Committee to see whether some expression could be found to reflect the various legal systems concerned.

12. With regard to the specific crimes set out in article 14, he pointed out that the number of accessions to the Convention on the Prevention and Punishment of the Crime of Genocide had increased and that the United States had acceded to that instrument at the end of 1987. A particular feature of the proposed provision on genocide was that it contained an enumerative rather than an exhaustive list, which was a prudent approach. He had also decided to distinguish genocide from other inhuman acts, in which respect he felt that the 1954 draft code lacked a certain precision. Genocide was itself an inhuman act, but it had been incorporated in a separate provision because it was the prototype, as it were, of what constituted a crime against humanity.

13. Some members wanted to broaden the definition of *apartheid* because they held the view that the proposed provision could give the impression that *apartheid* was limited to South Africa. He had placed the words "as practised in southern Africa" between square brackets in the second alternative to draw the Commission's attention to the fact that only South Africa would be covered. But he did not want to make *apartheid* seem commonplace. There were, of course, various forms of racial discrimination and they could perhaps be encompassed by a reference to "*apartheid* and other forms of racial discrimination". The expression "customary *apartheid*" was, however, quite unacceptable and could only cause confusion, particularly since custom was a source of international law. A reference to customary *apartheid* should not be included and some other expression must be found.

14. The International Convention on the Suppression and Punishment of the Crime of *Apartheid* had not yet been universally accepted and it was important to find wording that would not create obstacles to further accessions by States. Mr. Reuter (2098th meeting) had referred to the Vienna Convention on Succession of States in respect of Treaties as an example of how slow the codification process was. It was to be hoped that an equally long period—in which *apartheid* might well disappear—would not be required to finalize and adopt the draft code: it would be regrettable if the Commission were to find itself dealing with "ghosts" or "fossils". Moreover, in his view *apartheid* was a violation of *jus cogens*.

15. There had been a lengthy discussion on the application of the concept of inhuman acts to attacks on property and he found himself in broad agreement with other members of the Commission. He believed, however, that a distinction should be drawn between attacks on property as war crimes, which were already specifically covered by article 85 of Additional Protocol I to the Geneva Conventions, and such attacks considered as crimes against humanity, which constituted a separate issue. The prohibition of attacks on property in wartime was relative in that it entailed exceptions, for example destruction of property for reasons

[8] *Yearbook . . . 1986*, vol. II (Part One), pp. 56-57, document A/CN.4/398, paras. 12-15.

of military necessity or cases in which the property was adjacent to military targets. No such limitations applied to attacks on property considered as crimes against humanity: in such instances the prohibition was absolute.

16. The question of harm to the environment raised many very complex issues, especially with regard to intent. In that connection, article 19 of part 1 of the draft articles on State responsibility had been the source of numerous reservations and he had accordingly tried to use a different formulation in the present draft. The problem lay in the element of intent: since lawful activities by States sometimes caused environmental harm, what criteria were to be used in distinguishing between intentional and non-intentional acts which occasioned such harm? Draft article 14 was solely concerned with environmental harm resulting from acts committed with criminal intent. But there were areas in which the courts, however well instructed, would find it difficult to establish such intent. Nevertheless, such elements of culpability as gross error or grave negligence could be subsumed within the concept of criminal intent. Acts causing environmental harm in wartime were already covered by article 35, paragraph 3, of Additional Protocol I and in any case came within the purview of draft article 13. Attacks on the environment in peacetime, on the other hand, should be the subject of a separate provision. He had been asked to clarify the expression "vital human asset", as used in paragraph 6 of draft article 14, and found it difficult to define the expression except as meaning "essential to life". But if it were deemed unsatisfactory he would be open to suggestions for an improved wording.

17. The 1954 draft code had included enslavement as an international crime, but slavery should be given greater prominence and he had accordingly made it the subject of a separate provision. It might be appropriate to distinguish between slavery as a war crime and as a crime against humanity.

18. The question of mass expulsions had also been aired during the debate, particularly with regard to the implications of the term "transfer" (para. 4 (*a*)). Mr. Tomuschat, Mr. Pawlak and Mr. Reuter had all mentioned instances related to a specific region that would be duly taken into account. Again, distinctions should be drawn between transfers effected for humanitarian reasons and those covered by the draft code. The former were in the nature of rescue operations which were carried out when a population in a country not its own found itself threatened by torture or death. The latter were forced transfers of people from their country of origin to another country: such transfers clearly constituted inhuman acts and should fall within the scope of the code.

19. His position in respect of international drug trafficking had become less firm as a result of the Commission's discussion. The motives of international drug traffickers were undoubtedly base, and their actions could, if they succeeded in destabilizing States, be regarded as crimes against the peace and security of mankind. But it was important to distinguish between such motives and the motives which constituted the criteria for characterizing crimes against humanity.

20. Some members had stressed the importance of the question of an international criminal court. He himself had not proceeded on the assumption that a system of universal jurisdiction was to be excluded, but he would not ignore the possibility of introducing an appropriate draft article or provision at a subsequent session of the Commission. The General Assembly had given no clear instructions in that regard.

21. In conclusion, draft articles 13 and 14 could, if the Commission so decided, be referred to the Drafting Committee. As Special Rapporteur, he would submit a list of war crimes for discussion in the Committee, taking into account the suggestions made by members of the Commission.

22. The CHAIRMAN said he understood that the Commission wished to refer the draft articles to the Drafting Committee and that members of the Commission would transmit their suggestions regarding the list of crimes to the Committee's Chairman in the next few days.

23. Mr. BARBOZA said it was his impression from the Special Rapporteur's summing-up that he (Mr. Barboza) had been construed as opposing the inclusion of the criterion of gravity in connection with war crimes. If so, that was not correct. Like other members of the Commission, he thought it important to include the concept of gravity and also a list of the crimes concerned, without which it would be impossible to determine which crimes came within the scope of the code, a task which in any case could not be left to a court or to a judge.

24. He agreed that the draft articles should be referred to the Drafting Committee. Regarding the list of crimes to be considered by the Commission, if sufficient time were not available, it would be appropriate to defer compilation of the list until the next session.

25. Mr. ARANGIO-RUIZ said that he had perhaps not made himself sufficiently clear when he had questioned (2097th meeting) the unqualified use of the concept of gravity or seriousness in connection with war crimes. It was no doubt relatively easy in the case of crimes against the peace and security of mankind to confine the scope of the code to the most serious offences, but in respect of war crimes in a narrow technical sense it was much more difficult. In dealing with the situation in which war crimes were committed during an armed conflict, some conventions and instruments relied on the criterion of seriousness, but he was not quite prepared to agree that a belligerent's right or obligation to prosecute and punish should be envisaged in the code solely in the case of serious crimes. A belligerent State which had been injured, or whose armed forces or population had been injured, by war crimes *stricto sensu* was entitled under existing law to proceed or not to proceed against the captured criminals whatever the degree of gravity of the violation. The code should in no way restrict that right by introducing the concept of gravity for war crimes in a narrow sense. Moreover, the obligation to prosecute and punish eventually introduced by the code should be expressly extended to cases in which the criminals concerned were members of the country's own armed forces. The problem was not merely aesthetic, namely whether to retain the unity of the concept of war crimes, but one of substance which should be referred to the Drafting Committee for further consideration.

26. The CHAIRMAN said that he did not think the intention was to change the concept of war crimes in general. Rather, it was a question of which war crimes the Commission felt should be included in the draft code.

27. Mr. FRANCIS said that he welcomed the Special Rapporteur's comprehensive summing-up and flexible approach. It would be recalled that, at the previous meeting, he had asked for time to consult with other members of the Commission, particularly Mr. McCaffrey, before making any further statement on the list of crimes to be submitted to the plenary session of the Commission. Since he had not yet completed those consultations, he would defer further comment.

28. Mr. DÍAZ GONZÁLEZ noted that the Special Rapporteur had referred, in connection with the crime of *apartheid*, to the need to avoid using concepts that would become obsolete with time. However, in drafting article 14 the Commission was trying to legislate in global terms: even if *apartheid* were to disappear in South Africa, that did not mean it would necessarily vanish from the face of the earth. In the case of genocide, for example, the Nazis still had their disciples and the crime could not be regarded as extinct. Similarly, although the process of decolonization was largely complete, there were still peoples which did not fully enjoy their right to self-determination. He therefore believed that the square brackets in the second alternative of paragraph 2 should be deleted, so that the crime of *apartheid* could be punished as appropriate if and when it arose in future. Lastly, in his opinion draft articles 13 and 14 should be referred to the Drafting Committee.

29. Mr. BARSEGOV said that he was very grateful for the Special Rapporteur's highly interesting and detailed summing-up, with which he found himself largely in agreement.

30. It was his impression that difficulties with regard to the role of intent and motive had significantly narrowed. In his view, it was generally agreed that the element of intent must be present in the definition of the crimes concerned. If it were absent, the crime might be qualified in a completely different way: for example, if a doctor killed a patient unintentionally, he would none the less be guilty of negligence. As regards the element of intent in relation to crimes characterized by their massive and systematic nature, the only point at issue related to whether it was necessary or not to prove its presence. There were differences, however, with regard to the element of motive. Difficulty arose from the fact that the French text frequently referred to *mobile*, which was sometimes translated by "motive", but more often by "intent".

31. That was a question of translation, but a further difficulty related to substance. While every criminal had motives (such as jealousy in the case of a *crime passionnel*, for example) and international crimes were also motivated, to establish motive as a constituent element of such crimes would mean that the offender would be liable to prosecution only if it could be proved that the crime concerned was committed specifically for the motives alleged. Fortunately, in dealing with such serious crimes as genocide or *apartheid*, the international community had agreed that motive need not be taken into account: it was thus immaterial whether an act of genocide was committed, for instance, for State interests or for racial or other motives. That was the crux of the problem, and that was why he was concerned that the draft code should not introduce a subjective element into the definition of crimes against mankind.

32. He welcomed the Special Rapporteur's elucidation of the expulsions or forcible transfers of populations which fell within the scope of the draft code. The formula used by the Special Rapporteur was satisfactory in that it was understood to refer to the forcible transfer of a population from its own territory, whatever the reasons for that transfer, and not to transfers carried out pursuant to peace treaties or regulations. The formula used made it possible to avoid a very thorny problem, namely whether the draft code covered expulsions of a population within its own territory or in occupied foreign territory. He thought it would be a highly complex exercise to limit the question to the latter cases. Such crimes as *apartheid* or genocide, of which expulsion was a constituent element, were generally committed in the territory of the population concerned, although the First and Second World Wars had provided examples in which genocide against a population had been initiated in the territory of the perpetrator State itself and subsequently continued in the territory of neighbouring countries. The Special Rapporteur's wording offered promising prospects for the handling of an extremely complex issue.

33. On the question of the campaign against the international traffic in narcotics, he agreed that the problem of illicit trafficking was indeed of the highest importance. It was true to say that, while the traffickers were acting from motives of profit, the result of their crimes was an attack on mankind in general. It was therefore appropriate to consider the question of drug trafficking in the context of crimes against mankind.

34. Turning in conclusion to a question of history concerning the concept of crime against humanity, he said that the Special Rapporteur was not correct in stating (para. 10 above) that the United States had not accepted that concept. It was known that the United States had not opposed the 1915 declaration on the Armenian massacres, and indeed that it had been transmitted to the Ottoman Government by the United States, which at that time adhered to a policy of neutrality.

35. Mr. ROUCOUNAS, referring to the mass destruction of property as a crime against humanity, said that the Special Rapporteur had drawn a distinction, with which he agreed, between the destruction of property in wartime and in peacetime. Actually, war crimes might include crimes against humanity taking the form of mass destruction of property. Moreover, such crimes should have a qualitative as well as a quantitative aspect, to cover destruction of property that was not necessarily on a large scale. Bearing in mind that society's awareness of the common heritage of mankind was constantly developing, he wondered if the Special Rapporteur would agree that individual items, such as monuments, designated by UNESCO as being of great value to mankind should be afforded special protection.

36. Mr. HAYES observed that the forcible transfer of populations raised several serious questions. In the light of the Special Rapporteur's explanation that it did not include transfers for humanitarian reasons and referred only to the removal of a people from its country of origin, he wondered in what circumstances the transfer of foreigners might be justifiable. He was particularly anxious to clarify how long foreigners would retain alien status before becoming citizens of their new country of residence. If forcible transfer could be justified on humanitarian grounds, artificial threats could well be directed against foreigners in order to create a situation supposedly justifying the need to move them. Furthermore, could transfers of population be justified on

grounds of famine, as in Africa in recent years? The definition of forcible transfer did not make that clear.

37. Mr. KOROMA said that he was still uncertain whether forcible transfer referred to removals between countries, between territories, or both. There had been many such transfers, especially in southern Africa, where thousands of people had been moved from their fertile ancestral lands to arid terrain on which they had to scavenge for a living. Such transfers, carried out in the name of economic development, were not confined to southern Africa. In his opinion, they ought to qualify for inclusion under the rubrics of genocide and *apartheid*. They certainly amounted to more than a denial of self-determination. As an item for the Planning Group to discuss, he suggested that a topic for future consideration by the Commission should be the law concerning the movement of people, either within or between States.

38. Mr. THIAM (Special Rapporteur), referring to the comments made by Mr. Díaz González, said he was convinced that *apartheid* would disappear one day. Certainly, *apartheid* was practised in a systematic fashion in only one country, South Africa. That was the practice referred to in draft article 14; the other instances mentioned were cases of racial discrimination. In response to Mr. Hayes, he explained that forcible transfer of populations was intended to refer only to removals from the country of origin to another, and not to internal transfers, whether for economic or for other reasons. In reply to Mr. Barsegov, he recalled from his own reading that, during the First World War, the United States of America, because of its positive-law tradition, had been reluctant to accept the concept of crimes against humanity, on the basis of the principle *nullum crimen sine lege*.

39. The CHAIRMAN suggested that draft articles 13 and 14 should be referred to the Drafting Committee, leaving time for consideration of the proposed list of war crimes at a future meeting.

It was so agreed.[9]

State responsibility (A/CN.4/416 and Add.1,[10] A/CN.4/L.431, sect. G)

[Agenda item 2]

Parts 2 and 3 of the draft articles[11]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

NEW ARTICLES 6 AND 7 OF PART 2

40. The CHAIRMAN recalled that the Special Rapporteur had introduced his preliminary report on the topic (A/CN.4/416 and Add.1) at the previous session[12] but that it had not been considered due to lack of time. He invited the Commission to consider the report, as well as the new articles 6 and 7 of part 2 of the draft contained therein, which read:

Article 6. Cessation of an internationally wrongful act of a continuing character

A State whose action or omission constitutes an internationally wrongful act [having] [of] a continuing character remains, without prejudice to the responsibility it has already incurred, under the obligation to cease such action or omission.

Article 7. Restitution in kind

1. The injured State has the right to claim from the State which has committed an internationally wrongful act restitution in kind for any injuries it suffered therefrom, provided and to the extent that such restitution:

(*a*) is not materially impossible;

(*b*) would not involve a breach of an obligation arising from a peremptory norm of general international law;

(*c*) would not be excessively onerous for the State which has committed the internationally wrongful act.

2. Restitution in kind shall not be deemed to be excessively onerous unless it would:

(*a*) represent a burden out of proportion with the injury caused by the wrongful act;

(*b*) seriously jeopardize the political, economic or social system of the State which committed the internationally wrongful act.

3. Without prejudice to paragraph 1 (*c*) of the present article, no obstacle deriving from the internal law of the State which committed the internationally wrongful act may preclude by itself the injured State's right to restitution in kind.

4. The injured State may, in a timely manner, claim [reparation by equivalent] [pecuniary compensation] to substitute totally or in part for restitution in kind, provided that such a choice would not result in an unjust advantage to the detriment of the State which committed the internationally wrongful act, or involve a breach of an obligation arising from a peremptory norm of general international law.

41. Mr. ARANGIO-RUIZ (Special Rapporteur) reminded members that his preliminary report (A/CN.4/416 and Add.1) contained a general outline of the proposed work on parts 2 and 3 of the draft (chap. I), followed by a treatment of cessation of the unlawful conduct (chap. II.B) and restitution in kind (chap. II.C). He suggested that consideration of the topic should begin with the latter two questions, proceeding afterwards to the general outline.

42. His forthcoming second report—to be considered later—would, together with the preliminary report, cover all the substantive consequences of a wrongful act, i.e. consequences which derived immediately from the commission of an internationally wrongful act, as distinct from measures taken by the injured State in consequence of the

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[9] For the Commission's discussion on the proposed list of war crimes, see 2106th and 2107th meetings.

[10] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[11] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook . . . 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[12] See *Yearbook . . . 1988*, vol. I, pp. 265 *et seq.*, 2081st meeting, paras. 37-57, and 2082nd meeting, paras. 1-24.

act. However, whereas the preliminary report dealt only with cessation and *restitutio in integrum*, the second report would complete the substantive consequences by adding reparation by equivalent, pecuniary compensation, satisfaction, and guarantees against repetition.

43. Mr. BARBOZA congratulated the Special Rapporteur on his most distinguished preliminary report (A/CN.4/416 and Add.1). Unfortunately, there were a number of errors in the Spanish translation and he would be submitting corrections to the Secretariat.

44. The Special Rapporteur proposed to deal in the new articles 6 and 7 of part 2 of the draft with cessation and restitution in kind. The text of article 6 submitted by the previous Special Rapporteur had been considerably altered and served as the basis for both of the new articles. As the Special Rapporteur explained in his report (*ibid.*, para. 24), he felt that the whole subject-matter should be covered in greater detail and include, in particular, reparation by equivalent, satisfaction and the distinction between compensation for material injury and compensation for moral damage. The Special Rapporteur also proposed to deal separately with the legal consequences of international delicts and of international crimes, since it was not wholly clear whether those consequences had a common denominator.

45. There was no reason to object to the Special Rapporteur's approach. His statement that

> the Special Rapporteur does not question, for the purposes of the Commission's present task, the choice made by the Commission with regard to the notion of international responsibility and to the definition of the legal relationships and situations created by an internationally wrongful act (*ibid.*, para. 16)

was important, meaning that the Commission held to the view that the injured State had the right to demand reparation and that the author of the wrongful act could be punished either by the injured State or by a third party. The basic idea that there were two kinds of legal relationship resulting from the breach of an obligation was thereby preserved. The Special Rapporteur also proposed to deal with "implementation" (*mise en oeuvre*) within the sections of the draft on the consequences deriving from international delicts and from international crimes, and in parallel with the substantive rights and obligations deriving from such delicts and crimes. The proposed outline of work for parts 2 and 3 of the draft seemed sensible.

46. Much of the first part of the report dealt with cessation, drawing certain important conclusions. First, cessation *per se* had a different remedial function than did restitution, compensation or satisfaction (*ibid.*, para. 22). It also differed from the remedies included in the concept of reparation in that it pertained to the wrongful act itself, rather than to the legal consequences (*ibid.*, para. 31). Cessation was to be ascribed not to the effects of the secondary rule brought into operation by the wrongful act, but to the continued, normal operation of the primary rule violated by the wrongful conduct. Cessation was of interest only where the wrongful act was continuous in character (*ibid.*, para. 33). Cessation must also be clearly distinguished from reparation; the latter corresponded to the requirement, defined by the PCIJ in the *Chorzów Factory* case, that all the consequences of the breach of an international obligation on the relations between the author State and the injured State should be wiped out (*ibid.*, para. 39). Cessation was not defined, but it was clear that it did not cancel any legal or factual consequences of the wrongful act; its target was the wrongful conduct *per se*, in other words the very source of responsibility (*ibid.*, para. 40).

47. The Special Rapporteur also referred (*ibid.*, footnote 59) to the decision of 5 March 1955 by the Franco-Italian Conciliation Commission in the *SNCF* case. Apparently, the Special Rapporteur regarded the return of the railway material from Italy to France as a "cessation" of the wrongful act. The wiping out of the consequences, in other words restoring the material to its previous undamaged condition, was reparation. However, what practical purpose was served in that instance by the legal distinction drawn between the act and its consequences? Cessation might also be a legal consequence of the wrongful act, of the same kind as the other consequence, namely Italy's obligation to restore the material to its previous condition.

48. Cessation was, as he saw it, principally a legal consequence of the violation of the primary obligation. It was not by any means actual compliance with that obligation: it had a completely different meaning from compliance. To illustrate that difference, one could take the hypothetical example of State A, found responsible for taking members of the embassy of State B as hostages. The primary obligation of State A was not to tamper with the personal freedom of persons with diplomatic status, and specifically with those from State B. State B would then claim immediate cessation of the situation, so that State A had to return the hostages. That was the content of cessation, to return the hostages. However, returning the hostages was a completely different thing from refraining from putting them in gaol, i.e. the content of the primary obligation. The content of cessation was the conduct required of a State that was in the wrong—a conduct completely different from that required by the primary obligation.

49. Obviously, cessation could not have been requested had it not been for the breach of the primary obligation. It was therefore a consequence of the breach of the primary obligation and compliance with the request for cessation did not mean that the primary obligation had been fulfilled. The primary obligation which had been violated continued to be in breach after cessation. The violation of the obligation was complete with the initiation of the wrongful act. Cessation required conduct which was different from that required by the primary obligation. In his example, the hostages were restored to the situation of freedom which they had enjoyed before the breach, but it would be a gross mistake to consider their release as the fulfilment of the primary obligation.

50. If one were to follow the Special Rapporteur's view, the legal consequences of the violation would have to be ascribed to two different sources in a case such as the *SNCF* case between France and Italy: the return of the railway material would be a consequence of the primary obligation and the restoration of the condition of that material would be a consequence of the secondary obligation. That point of view, apart from its doubtful character, would introduce a conceptual cleavage in the distinction between primary and secondary rules. By definition, the realm of the primary rule was the time before the violation and that of the

secondary rule after the violation. That had been precisely one of the considerations on the basis of which the Commission had made the topic of State responsibility independent from that of responsibility for the treatment of aliens. Accordingly, it would certainly be conceptually disturbing to admit the Special Rapporteur's position.

51. Cessation thus seemed to be one of the components of reparation. A wrongful act remained a wrongful act until the other components of reparation were complied with, i.e. until the other consequences of the breach were wiped out. In his report, the Special Rapporteur considered that cessation applied to omissions as well as to positive acts, and hence that there could be "continuing omissions" as well as "continuing acts". In fact, however, non-compliance with any obligation to do something (*obligation de faire*) would imply a continuing omission and cessation would then apply to that category of obligations. Cessation, however, was a negative concept which, if superimposed on the other negative concept of omission, made for two negatives. Did States ask for the cessation of non-compliance with an obligation not to do something, or did they simply demand specific performance of an obligation that had been violated? Cessation did not appear to be a useful tool in those cases, even in the case of a State that failed to pass a law which it had a duty to enact pursuant to its international obligations.

52. Mr. RAZAFINDRALAMBO said that, before commenting on the Special Rapporteur's excellent preliminary report (A/CN.4/416 and Add.1), he wished to draw attention to some shortcomings in the presentation. In particular, the method of grouping all the notes at the end was unsatisfactory. They had to be read in conjunction with the paragraphs of the text to which they referred and each of them should have been placed at the foot of the relevant page.

53. He was in broad agreement with the Special Rapporteur's proposals concerning the outline of part 2 of the draft as well as those for the draft articles. The Special Rapporteur was also right to say that articles 1 to 5 of part 2, which had already been provisionally adopted by the Commission, should be retained and that they could constitute a preliminary chapter of part 2 to be provisionally entitled "General principles". He noted with interest the Special Rapporteur's intention to recast draft articles 6 to 16 of part 2 and draft articles 1 to 5 of part 3 as submitted by the previous Special Rapporteur. Considering that those articles had been referred to the Drafting Committee before the start of the term of office of the Commission's present membership, the new members should have an opportunity to express their views on the content, forms and degrees of international responsibility and on the question of the peaceful settlement of disputes.

54. The most interesting innovation was the Special Rapporteur's intention to prepare two chapters on the legal consequences arising from an international delict and those arising from an international crime. In proposing for methodological reasons and on grounds of prudence to examine the consequences of delicts and those of crimes separately, he would be departing from the method adopted by the previous Special Rapporteur, who had set forth in draft articles 6 to 13 of part 2 the various consequences of wrongful acts in general, as consequences that applied both to delicts and to crimes. Consequently, the Special Rapporteur seemed to have returned to the approach adopted by the Commission in paragraph (53) of the commentary to article 19 of part 1 of the draft articles, in which it had emphasized that "it would be absolutely mistaken to believe that contemporary international law contains only one régime of responsibility applicable universally to every type of internationally wrongful act"[13] without any distinction.

55. The Special Rapporteur's analysis (*ibid.*, para. 14) of the distinction between the various forms of reparation—a matter of substance—and the measures aimed at securing reparation—a matter of procedure and of form—was very pertinent because it could serve to bring out the differences between the situation regarding delicts and the situation regarding crimes. It also served to justify the separate treatment given to questions of cessation and reparation, on the one hand, and questions relating to the adoption of measures by the injured State, on the other.

56. As to the Special Rapporteur's suggestion to consider the content of part 3 of the draft in terms of the peaceful settlement of disputes rather than "implementation" (*mise en oeuvre*), as early as 1975 the Commission had considered the question of implementation as one connected with the peaceful settlement of disputes.[14] Since then the two questions had been considered inseparable. The previous Special Rapporteur had confined himself to the settlement of disputes in the texts he had submitted for draft articles 1 to 5 and the annex of part 3, drawing on the provisions of articles 65 and 66 and the annex of the 1969 Vienna Convention on the Law of Treaties. The present Special Rapporteur was simply following that example, but suggesting the more correct title: "Peaceful settlement of disputes". The reasons given by the Special Rapporteur (*ibid.*, para. 19) seemed convincing. For his own part, he would go even further and say that the implementation of international responsibility belonged not only in part 2 of the draft, but also in part 1 in the case of an international obligation relating to the treatment of aliens and the question of the exhaustion of local remedies (art. 22).

57. Chapter II of the preliminary report dealt with the two legal consequences of an internationally wrongful act: cessation and restitution in kind. The previous Special Rapporteur had dealt with both of those forms of remedy for the violation of international law in a single provision in part 2, namely draft article 6, but the present Special Rapporteur considered that that article was insufficient and that the whole subject-matter should be covered in greater detail and depth. After a penetrating analysis of the relevant legal writings and international judicial and arbitral practice, the Special Rapporteur had arrived at the conclusion that cessation was not a form of reparation, although it had often been confused with *restitutio in integrum*. Cessation and restitution differed both by their nature and by their role and purpose: restitution went further than cessation of the wrongful conduct and required actual restoration of the object in the state in which it had been before the lawful owner had been dispossessed, i.e. restoration of the *status quo ante* (*ibid.*, para. 52).

[13] *Yearbook . . . 1976*, vol. II (Part Two), p. 117.

[14] See *Yearbook . . . 1975*, vol. II, p. 56, document A/10010/Rev.1, para. 44.

58. The Special Rapporteur was therefore right to propose that cessation of an internationally wrongful act should form the subject of a provision separate from those on other forms of reparation, and particularly restitution in kind. The new draft article 6 was entitled "Cessation of an internationally wrongful act of a continuing character", but since international delicts and international crimes were to be treated separately, a better title would be "Cessation of an international delict of a continuing character".

59. The new draft article 6 was framed from the standpoint of the obligations of the author State, and independently of the rights of the injured State. The obligation to cease the wrongful act thus found its source in the primary rule which had been violated and which existed prior to the claim by the injured State. He endorsed the formulation "A State . . . remains . . . under the obligation to cease . . . " and would point out that the French expression *est tenu* did not fully render the nuances of the term "remains". On the other hand, he had doubts about the words "action or omission", a formula which the Commission had so far adopted only in the case of an act consisting of a "series of actions or omissions" or a "complex act" consisting of a succession of "actions or omissions", i.e. the situations dealt with in article 18, paragraphs 4 and 5 respectively, and in article 25, paragraphs 2 and 3 respectively, of part 1 of the draft.

60. If the aim was to indicate that cessation applied both to the breach of an obligation to perform an act (omission) and to the breach of an obligation to refrain from an act (action), it was not enough to speak of an internationally wrongful act of a "continuing character". Reference should also be made to the "composite act" and the "complex act" mentioned in article 25, paragraphs 2 and 3 respectively, of part 1. The effect would be to lengthen considerably the text of draft article 6 and the best course might therefore be to employ the formula used in the title of article 25 and to speak of a State whose action or omission constituted an internationally wrongful act "extending in time".

61. Moreover, since the obligation of cessation was outside the scope of reparation and the resulting legal relationships, to which the Special Rapporteur—unlike his predecessor—intended to give separate treatment, it was useful to indicate that it did not affect the legal consequences of the responsibility already incurred as a result of the wrongful conduct. However, the wording used for that purpose in article 6, namely "without prejudice to the responsibility it has already incurred", was not altogether satisfactory. It could be replaced by "independently of the responsibility already incurred".

62. It was, however, on the question of reparation in its various forms that the Special Rapporteur was proposing the most significant modifications in comparison with the provisions of draft articles 6 and 7 submitted by his predecessor. He had adduced abundant material, both legal writings and State practice, in support of his conclusions, which pointed to the primacy of restitution in kind. His explanations of the definition of *restitutio in integrum* were acceptable, as was the approach he employed of merging the element of reparation with that of compensation. That approach was consistent with the general principle of law which imposed upon the author of a wrongful act the obligation to make reparation for all the consequences of its wrongful conduct by restoring the situation that would have existed if the breach had not occurred; that justified restitution in kind *stricto sensu* and, where appropriate, an additional financial compensation.

The meeting rose at 1.05 p.m.

2103rd MEETING

Wednesday, 17 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/416 and Add.1,[1] A/CN.4/L.431, sect. G)

[Agenda item 2]

Parts 2 and 3 of the draft articles[2]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 6 (Cessation of an internationally wrongful act of a continuing character) *and*

ARTICLE 7 (Restitution in kind)[3] (*continued*)

1. Mr. RAZAFINDRALAMBO, continuing the statement he had begun at the previous meeting, noted that the Spe-

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

[2] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook . . . 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[3] For the texts, see 2102nd meeting, para. 40.

cial Rapporteur was rejecting the proposal made in draft article 7 of part 2 as submitted by his predecessor to establish a special régime for a breach of the rules on the treatment of aliens. For the Special Rapporteur, any measures taken to bring about the cessation of a wrongful act suffered by a foreign national fell within the realm of reparation of an injury to the State of allegiance itself and of restitution in kind. There were, of course, different degrees in the extent of injury, and the breach of a rule on the treatment of aliens might, for example, at the same time be an act committed with the intention of harming the State: it was in such a case that reference might be made to "direct injury". That was what often happened in the case of violation of the civil, economic, social and cultural rights of immigrant workers from third world countries. In all cases, however, there could and should, in principle, be only one mode of reparation to be provided as a result of a wrongful act or conduct. The Special Rapporteur was therefore right to propose that restitution in kind should be a general rule.

2. With regard to the exceptions to that rule, the Special Rapporteur's preliminary report (A/CN.4/416 and Add.1) contained some interesting arguments on cases of impossibility of restitution in kind with which he was bound to agree. Like the Special Rapporteur, he took the view that no legal obstacle could derive from internal law. He also thought that the Special Rapporteur was right to disagree with his predecessor's opinion that the author State would not be bound by an obligation of restitution in kind which was contrary to its domestic jurisdiction. The argument on that point (*ibid.*, para. 89) was wholly convincing. The Special Rapporteur was, however, proposing in the new draft article 7 that the excessive onerousness of the burden on the author State should be allowed as an obstacle to restitution, for it would endanger the equitable balance between the conflicting interests present in each case. That proposal would give effect to the principle of proportionality between the seriousness of the violation and the injury caused, on the one hand, and the quality and quantity of the reparation, on the other—for example, where restitution would seriously jeopardize the political, economic or social system of the State. The proposal aimed to safeguard international stability and peace and would promote the progressive development of international law; it therefore deserved support.

3. The Special Rapporteur was proposing a further significant innovation by giving the injured State a right of choice between restitution in kind and pecuniary compensation—a choice to which the author State would be bound to consent and which the Special Rapporteur justified on the basis that it was the author State which was responsible for the injury. He himself wondered whether that proposal did not conflict with the idea that restitution in kind should be based on the need to re-establish the situation which would have existed if the wrongful act had not occurred. The *Chorzów Factory* case, cited by the Special Rapporteur in support of his proposal (*ibid.*, para. 110), was not wholly conclusive, since, in that case, the condition of the factory at the time when compensation had been claimed had no longer corresponded to its condition at the time when it had been taken over: the case was thus one in which restitution had been materially impossible, rather than one in which the claimant State had genuinely been willing to forgo restitution.

4. In any event, freedom of choice on the part of the injured State was likely to lead to abuses and the attendant condition proposed by the Special Rapporteur, namely that the author State should not be placed at an unfair disadvantage, would be difficult to fulfil. It would surely be preferable to provide that the injured State and the author State could agree on pecuniary compensation as a substitute for restitution in kind. For that purpose, it would suffice to amend the beginning of paragraph 4 of draft article 7 by replacing the word "claim" by the words "agree to" and the words "in a timely manner" by "where appropriate" or "in all cases".

5. Finally, he thought that the new draft articles 6 and 7 could be referred to the Drafting Committee.

6. Mr. CALERO RODRIGUES said that, on the whole, he agreed with the changes suggested by the Special Rapporteur in his preliminary report (A/CN.4/416 and Add.1) to the outline of parts 2 and 3 of the draft articles. In particular, the Special Rapporteur was right to propose separate treatment for the consequences of international delicts and of international crimes. Instead of looking for the lowest common denominator between the two categories, it would be better first to adopt the provisions on delicts and then decide to what extent they also applied to crimes.

7. He also thought that, for the time being at least, the Commission should follow the Special Rapporteur's proposal and view part 3 of the draft in terms of the peaceful settlement of disputes arising in the field of State responsibility, rather than in terms of "implementation" (*mise en oeuvre*) (*ibid.*, para. 19). As a result, some of the articles proposed by the previous Special Rapporteur, especially articles 1, 2 and 3, would be removed from part 3 and placed in part 2.

8. With regard to the outline proposed by the Special Rapporteur (*ibid.*, para. 20), two new articles had so far been submitted for section 1 (Substantive rights of the injured State and corresponding obligations of the "author" State) of chapter II (Legal consequences deriving from an international delict) of part 2 of the draft.

9. The text proposed by the Special Rapporteur for article 6, on cessation, was more concise and more satisfactory than paragraph 1 (*a*) of draft article 6 as submitted by the previous Special Rapporteur, although there was no substantive difference between the two texts. He was wholly persuaded by the arguments in the report (*ibid.*, paras. 39-62) that cessation had inherent properties of its own which distinguished it from reparation. On that point, he did not share Mr. Barboza's opinion (2102nd meeting). The basic consideration, as the Special Rapporteur said, was that the primary obligation—the breach of which constituted the wrongful act—continued to exist and that cessation of the wrongful act was a consequence of that primary obligation. However, he did not think that draft article 6 belonged in chapter II of part 2, on the legal consequences of international delicts; it should, rather, be included in chapter I, on general principles. In his report (A/CN.4/416 and Add.1, especially paras. 31 and 40), the Special Rapporteur himself advanced theoretical arguments in favour of that suggestion. The decisive argument was nevertheless a practical one. The Special Rapporteur stated that, where reparation was concerned, "it is by a decision of the injured State that a 'secondary' legal machinery is set into motion. Were the

injured State not to put forward any claim for reparation, the 'secondary' legal relationship might not emerge" (*ibid.*, para. 55). It could be inferred that the provisions of chapter II would not be applied in such a case, whereas the obligation of cessation, according to the Special Rapporteur, had to be considered "not only existent, but in actual operation on the mere strength of the 'primary' rule, quite independently of any representation or claim on the part of the injured State" (*ibid.*). The provision on cessation should therefore be included in chapter I.

10. Turning to the new draft article 7, on restitution, he said that, as the Special Rapporteur noted (*ibid.*, para. 114), restitution in kind came foremost before any other form of reparation, since it enabled the injury suffered to be remedied in a "natural", "direct" and "integral" manner. The concept of restitution in kind was, however, not uniformly defined. For some, it meant the re-establishment of the situation as it had existed when the wrongful act had been committed; for others, it meant the re-establishment of the situation that would have existed had the wrongful act not been committed. He preferred the latter interpretation, as the Special Rapporteur and certain members of the Commission who had written on the subject—including Mr. Reuter and Mr. Graefrath—also seemed to do. There was, however, one lacuna, for the Special Rapporteur did not specify in draft article 7 which of those two interpretations should be adopted. In any event, it would be better to avoid the expression "restitution in kind", since it was not sufficiently explicit. The wording used in paragraph 1 (*c*) of draft article 6 as submitted by the previous Special Rapporteur, which referred to an obligation to "re-establish the situation as it existed before the act", though preferable, had two disadvantages: it was appropriate in cases where the wrongful act was an action, but not in cases where the act was an omission; and it implied acceptance of the first interpretation of the term "restitution". It would be better to say, for example, "to re-establish the situation that would exist if the wrongful act had not been committed".

11. Like the Special Rapporteur, he considered that restitution was a mode of reparation that should be applied as widely and as universally as possible and that there was no need to provide a special régime for breaches of the rules on the treatment of aliens, as the previous Special Rapporteur had done in the draft article 7 he had submitted. Very cogent arguments in that connection were adduced in the report (*ibid.*, paras. 104-108 and 121). Although restitution applied to all wrongful acts, it could not apply in all circumstances. It could be said, simplifying matters to the extreme, that restitution should not apply when it was impossible to carry it out: those were the terms used by the Special Rapporteur (*ibid.*, para. 85). That was self-evident in cases in which the nature of the act and of its injurious effects had rendered *restitutio* physically impossible: material impossibility then resulted in legal impossibility. The question which arose, however, was whether there could be legal impossibility if restitution was physically possible. In the new draft article 7 (para. 1 (*b*)), the Special Rapporteur recognized such impossibility where restitution would be contrary to a peremptory norm of general international law, for example the Charter of the United Nations. He could not but subscribe to that view, although such a situation was very unlikely. It was difficult to see how restitution could be contrary to a peremptory norm unless the primary obligation from which it derived was also contrary to that norm, in which event it would be devoid of legal consequences and the question would not arise.

12. On the other hand, the Special Rapporteur did not regard cases in which restitution would be contrary to an obligation of the author State towards a third State, and contrary to the domestic law of the author State, as cases of legal impossibility. He himself agreed entirely. He disagreed, however, with the exception laid down in paragraph 1 (*c*) and paragraph 2 of draft article 7, whereby restitution would not be required if it were "excessively onerous" for the author State, if it represented "a burden out of proportion with the injury caused by the wrongful act" or if it seriously jeopardized "the political, economic or social system" of the author State. Since restitution in kind was, in a way, the belated performance of an obligation, the doctrinal arguments put forward in that connection by the Special Rapporteur (*ibid.*, paras. 99-100) lacked conviction. As to the principle of proportionality between the seriousness of the injury and the quantity of reparation (*ibid.*, para. 103), it could apply only in the secondary relationship between the injured State and the author State; restitution conceived as the belated performance of the primary obligation could not be made dependent on it. Moreover, if restitution seemed to be excessively onerous, that simply meant that the performance of the primary obligation would also have been excessively onerous and that pecuniary compensation would be too.

13. Furthermore, it must not be forgotten that the Commission had provisionally adopted article 33 of part 1 of the draft, whereby the author State could invoke a state of necessity when the wrongful act was "the only means of safeguarding an essential interest . . . against a grave and imminent peril" (para. 1 (*a*)). A State which found itself in the situation referred to in paragraph 2 (*b*) of draft article 7 might conceivably be justified in invoking the terms of article 33, which would have the effect of precluding the wrongfulness of the act, without prejudice to any question regarding compensation for damage (art. 35 of part 1). He was therefore not in favour of treating the excessively onerous character of restitution as a ground for excluding restitution.

14. Lastly, with regard to the question whether the injured State should have a right of choice between restitution in kind and pecuniary compensation (*ibid.*, paras. 109-113), he was in favour of adopting the position taken by the Special Rapporteur for the time being and of reverting to the question when a draft article on pecuniary compensation had been submitted. He did not, however, think that the injured State should have the right to claim only part of the restitution in the form of pecuniary compensation when full restitution in kind was possible.

15. Mr. MAHIOU said that members had surely profited from the time that had elapsed between the submission and the consideration of the Special Rapporteur's excellent preliminary report (A/CN.4/416 and Add.1).

16. Commenting in general before turning to the draft articles, he noted that the approach adopted by the Special Rapporteur for parts 2 and 3 of the draft followed the same

lines—with a few exceptions—as that of his predecessor and the general plan for the topic adopted by the Commission at its twenty-seventh session, in 1975.[4] The Special Rapporteur had, however, proposed methodological adjustments which meant that part 2 would have to be recast. The first of those adjustments related to the distinction to be drawn between the consequences of international crimes and the consequences of international delicts. He welcomed that approach, particularly since the Special Rapporteur had indicated that it could always be abandoned if it proved to be of little use. The report (*ibid.*, para. 18) was quite clear on that point, stressing that the methodological aspect of the Commission's work should not have any implications for its substantive options. The other adjustment related to the settlement of disputes. On that point, the Special Rapporteur had departed somewhat from the position of his predecessor, who had dealt with two, perhaps different, things at the same time: the conditions to be fulfilled before an injured State could take legal action against the author State; and the actual procedures for the settlement of disputes. It would indeed be better to deal with those questions separately, since the conditions to be fulfilled came under part 2 of the draft, while the procedures for the settlement of disputes came under part 3.

17. Turning to the draft articles, he noted that the Special Rapporteur believed, not without good reason, that the difficulties the Commission and the Drafting Committee had had with draft article 6 of part 2 as submitted by the previous Special Rapporteur stemmed from the problem of the distinction between cessation and the other forms of reparation. After an examination of legal writings and practice, the Special Rapporteur had arrived at the following conclusions: first, cessation had to be expressly provided for in the draft; secondly, its scope had to be explicitly defined; and, thirdly, it had to be dealt with in a draft article that was separate from those relating to the other forms of reparation. He himself had no objection to the first and the third of those conclusions. The problem of the scope of cessation was, however, a more delicate matter. In that connection, the Special Rapporteur gave a demonstration in which he indicated the similarities and, in some cases, the confusion between cessation and restitution, referring, for example, to "the noted difficulties of perceptibility of cessation *per se*" (*ibid.*, para. 31) and pointing out that cessation had to be ascribed not to the operation of a secondary rule, but to the operation of a primary rule. If that was the case, cessation should not be dealt with in part 2. The Special Rapporteur also admitted, however, that "While thus falling outside the realm of reparation and of the legal consequences of a wrongful act in a narrow sense, cessation nevertheless falls among the legal consequences of a wrongful act in a broad sense" (*ibid.*, para. 32). From that standpoint, cessation would have a place in part 2. Mr. Barboza (2102nd meeting) had raised interesting doctrinal issues in that connection, which he himself would nevertheless avoid for fear of leading the Commission away from its immediate concern, which was to formulate a provision on cessation, leaving the question of where it should be placed to be decided later.

18. There was, however, one point in the Special Rapporteur's analysis that should be given particular attention, namely his introduction of the idea (A/CN.4/416 and Add.1, para. 38 *in fine*) of an act or omission involving an initial phase which was likely to lead to a wrongful act and which would authorize the State that was likely to be injured to take certain steps, and in particular, to warn the potential author State not to embark on that initial phase so that its responsibility would not be engaged. While he understood the Special Rapporteur's concern, he found it difficult to see how it could be taken into account in the draft, since the problem was, rather, one of prevention. To the extent that the problem touched on that of international liability, it would belong more to the topic entrusted to Mr. Barboza. All in all, the concept of an initial phase was likely to give rise to more problems than it would solve and he was all the more reluctant to agree to it because it was very difficult to identify the potentially injured State: identifying the State that had actually been injured was already difficult enough in some cases.

19. With regard to *restitutio in integrum*, the work done by the Special Rapporteur helped to shed light on the basic elements which should guide the Commission in its work and he agreed on the whole with his arguments, including those which corrected some of his predecessor's analyses and even some of the comments made by the Commission itself. It was, for example, logical to consider that restitution in kind took precedence over all other forms of reparation (*ibid.*, para. 116). It was also quite normal to specify the cases in which restitution in kind was not possible, as the Special Rapporteur had done in paragraph 1 of the new draft article 7. There were, however, still some points on which his own doubts had not been entirely dispelled.

20. Thus, according to the Special Rapporteur, the obligation of restitution could not be affected either by a legal obstacle deriving from the internal law of the author State or by the existence of another international obligation, except one arising from a peremptory norm. To illustrate the second case, the Special Rapporteur gave the example of State A, which had an obligation to make restitution to State B, but refrained from doing so in order to comply with an obligation towards State C, noting that the case would be one of "a factual rather than a legal obstacle" (*ibid.*, para. 87). Why should the first situation be described as legal and the second as factual? On what basis should State A, which was confronted with two obligations, give precedence to one of them? Actually, the two obligations appeared to be equivalent and there was no valid reason for saying that State A did not have a right of choice. Perhaps the problem was that, in that example, the Special Rapporteur had not taken account of the nature and purpose of the obligations, whereas they should have been taken into consideration in order to determine which of the two equivalent international obligations should prevail. If, for example, the action of State A which had injured State B was simply affected by a defect of form and if restitution was likely to affect an equally important obligation of State A towards State C, would that mere defect of form lead to *restitutio in integrum*? There were thus situations in which the rule of *restitutio in integrum*, if rigidly invoked, could have paradoxical consequences.

[4] *Yearbook . . . 1975*, vol. II, pp. 55-56, document A/10010/Rev.1, paras. 38-44.

21. As for the so-called rule of domestic jurisdiction, which raised the problem of nationalizations in particular, the Special Rapporteur had not taken the same stand as his predecessor and did not regard the concept of domestic jurisdiction as a possible exception to the obligation of restitution. He thus rejected the exception proposed by his predecessor in respect of the treatment of aliens by refuting the distinction between direct and indirect injury. He himself shared that view: the distinction between direct and indirect injury did not have a sound enough basis to warrant deriving from it an exception to the obligation of restitution. Moreover, the previous Special Rapporteur had not seemed to be fully convinced on that point. However, the next problem raised by the previous Special Rapporteur, namely whether restitution should be admitted in the event of a nationalization effected in breach of a rule of international law, was a very real one and one which could not be evaded. The present Special Rapporteur was aware of that problem and, in order to avoid having his hands tied by the rigid rule of *restitutio in integrum*, suggested a solution based on the excessive onerousness of the burden imposed: that criterion would, in his view, make it possible to safeguard the freedom of States to carry out any economic and social reforms they considered necessary. In fact, however, it must be noted that it was not so much excessive onerousness that was at stake as respect for the political, economic and social options of States. It was therefore somewhat artificial to try to establish a link between the exception to restitution and excessive onerousness and it would be better to base that exception on respect for the political, economic and social systems of States. That was, in fact, what the Special Rapporteur had done in the new draft article 7 itself, which contained the two formulas. In the final analysis, he himself agreed with that text, although the reasons on which it was based did not seem to have been explained clearly enough by the Special Rapporteur. Moreover, in paragraph 2 (*b*) of the article, the word "jeopardize" was not appropriate; it would be more normal to refer to "incompatibility" between restitution and the political, economic or social system of the author State.

22. In his view, the new draft articles 6 and 7 could be referred to the Drafting Committee.

23. Mr. ROUCOUNAS congratulated the Special Rapporteur on the remarkable work of synthesis in his preliminary report (A/CN.4/416 and Add.1). He approved of the Special Rapporteur's methodological approach, which was based on the distinction made by the Commission in article 19 of part 1 of the draft between "international crimes" and "international delicts" and which consisted in examining separately the legal consequences of the two categories of wrongful acts so as to make clear, on the one hand, the rights and duties of the parties with regard to the various modes of reparation for, and cessation of, the wrongful act and, on the other, the rights and *facultés* of the injured State to secure reparation and/or impose sanctions. That intellectual and practical approach, which was in keeping with trends in international law, was justified, despite the misgivings expressed in certain circles, in an attempt to clarify the matter.

24. Turning to the question of the cessation of an internationally wrongful act, he said that the Special Rapporteur had submitted a highly relevant account of doctrine and international practice, from which—despite the sometimes fundamental differences of opinion that could be noted—he had derived the rule set out in the new draft article 6. He supported that proposal *a priori* and agreed that cessation as such fulfilled a corrective function deriving from a legal régime different from that of reparation and therefore deserved to be the subject of a separate provision. In that connection, he drew attention to the key importance of the analysis of "primary" and "secondary" obligations made by Mr. Barboza (2102nd meeting). He also noted that, in his report (A/CN.4/416 and Add.1, para. 61), the Special Rapporteur indicated that cessation was not necessarily linked either to a primary obligation or to a secondary obligation. According to Combacau and Alland, the obligation of cessation was a "substitute primary obligation":[5] it would thus be neither a primary nor a secondary obligation. He himself therefore concluded that it would be preferable to place draft article 6 in the part of the draft devoted to general principles, rather than in the part concerned with the legal consequences proper of an internationally wrongful act.

25. Noting that the Special Rapporteur drew a distinction between a continuing act and an act whose effects were continuing and pointed out that the claim for cessation was admissible from the moment at which the threshold of wrongfulness had been crossed, he said that, like Mr. Mahiou, he feared that difficulties would arise that were inherent in the action expected of the wrongdoing State when that State was called upon to acknowledge the fact that its conduct would develop into an internationally wrongful act. It would be rather dangerous to assume that internal legislation, as it existed at a given moment, was capable of creating conditions conducive to the commission of a wrongful act. That approach, which could be described as "advanced" monism, might be followed in the EEC, but that organization was a case apart, since its legal order was itself a case apart. Personally, he questioned whether, as things stood, the international community was prepared to go quite so far.

26. It was interesting to note that the Special Rapporteur also drew a fundamental distinction between the right to claim cessation of the internationally wrongful act—a right which existed as long as the violation continued, but which was extinguished with cessation—and the right to reparation, which subsisted even if the violation had ceased and as long as there had been no response to it.

27. With regard to the Special Rapporteur's comments on the different functions of interim measures and cessation of the internationally wrongful act, he said that, although such measures were intended to ensure the cessation of the wrongful act in order to protect the rights of parties when there was a risk of irreparable harm, they depended on the jurisdiction of the body before which the case was brought—the ICJ or the Security Council, for example. Thus, while the injured State could always claim cessation of the internationally wrongful act through an application for interim measures, the body concerned might not agree to that approach. The fact remained that the right

[5] J. Combacau and D. Alland, "'Primary' and 'secondary' rules in the law of State responsibility: Categorizing international obligations", *Netherlands Yearbook of International Law, 1985* (The Hague), vol. XVI, p. 97.

of the injured State to claim cessation and the obligation of the author State to discontinue the internationally wrongful act subsisted even in the absence of interim measures.

28. A further reason why he considered that the inclusion of a separate rule on cessation of an internationally wrongful act was justified was the legitimate interest at stake. On the basis of the case-law in the making of the ICJ, the Commission had established, in paragraph 3 of article 5 of part 2 as provisionally adopted, as a counterpart to a State's obligations *erga omnes*, a corresponding right of all "injured States" if the internationally wrongful act constituted an international crime. Thus the determination of capacity to take action in the case of an internationally wrongful act depended on the characterization of the wrongful act itself, either as an international delict or as an international crime. If the act was a crime, all States were entitled to claim its cessation, but they did not all enjoy the right to reparation.

29. Noting in conclusion that the Special Rapporteur had placed the provision on cessation in the part of the draft dealing with the legal consequences of international delicts (chap. II of part 2) (*ibid.*, para. 20), he pointed out that, if that provision were not moved to the part devoted to general principles (chap. I), it would have to be reproduced in the same form in the part relating to the legal consequences of international crimes (chap. III).

The meeting rose at 11.30 a.m.

2104th MEETING

Thursday, 18 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/416 and Add.1,[1] A/CN.4/L.431, sect. G)

[Agenda item 2]

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

Parts 2 and 3 of the draft articles[2]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 6 (Cessation of an internationally wrongful act of a continuing character) *and*

ARTICLE 7 (Restitution in kind)[3] (*continued*)

1. Mr. TOMUSCHAT said that the main innovation introduced by the Special Rapporteur was perhaps greater clarification and concretization. The rules proposed by the previous Special Rapporteur in the previous draft article 6 of part 2 had dealt much too briefly with the consequences of internationally wrongful acts and the article could thus have become a mere shopping list that failed to provide the guidance the community of nations expected from the Commission's draft. The present Special Rapporteur rightly saw the need for much greater detail.

2. As for the suggested structure of the draft, there appeared to be a slight discrepancy. In the outline submitted in his preliminary report (A/CN.4/416 and Add.1, para. 20), the Special Rapporteur set out the subdivisions tentatively proposed for part 2 of the draft, but those headings did not appear in the part of the report containing the new draft articles 6 and 7 (*ibid.*, para. 132). Those headings were useful, however, and should be retained.

3. The intention was to separate the legal régime of international delicts from that applicable to international crimes, yet the wisdom of that approach was questionable. In the first place, article 6—drafted for delicts—would not be any different if drafted for international crimes. It was obvious that a duty of cessation existed for crimes, in fact even more than for delicts. The same considerations largely applied to draft article 7 as well. In that connection, he disagreed with the somewhat polemical character of the Special Rapporteur's arguments (*ibid.*, paras. 10 *et seq.*), which presented the concept of a lowest common denominator as something rather negative. A common denominator was not necessarily a low denominator. He was convinced that a broad régime applicable to all internationally wrongful acts did exist and that international crimes entailed some additional consequences—consequences which the Commission would have to determine as a matter of legal policy.

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[2] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook . . . 1985*, vol II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[3] For the texts, see 2102nd meeting para. 40

4. Another drawback resulted from dissociating the régime of international crimes from that of international delicts. By setting aside for the time being the more serious offences, one would be deliberately ignoring the fact that there were certain limitations to international responsibility. States were not mere abstract entities; they were communities of human beings. For instance, article 20 of the African Charter on Human and Peoples' Rights[4] stated: "All peoples shall have right to existence. . . . " The consequences of an internationally wrongful act must not be defined in such terms as to negate a people's right to existence. To take the example of the recent armed conflict between Iran and Iraq, even if it could be determined with certainty which had been the aggressor, the ensuing consequences could not conceivably lead to a situation tantamount to financial chaos for the people declared to be the aggressor.

5. As to international case-law, the decisions of international courts and arbitral tribunals covered only a limited field, mainly injury to aliens, the specificity of which the Special Rapporteur did not wish to acknowledge. Most of the cases tried by such courts and tribunals related to situations in which material damage had occurred, for only in that type of case did States engage in proceedings before international courts. However, the legal departments of foreign ministries dealt with many other cases involving no material damage. In that regard, the former Special Rapporteur for the present topic, Mr. Ago, had affirmed that damage was not a pre-condition for responsibility—an approach that was the Commission's starting point in its attempt to codify the content, forms and degrees of international responsibility. Almost every day breaches were committed of such international obligations as the duty of consultation or the duty of co-operation. It was important to remember that the draft articles on State responsibility covered those breaches as well. They should be taken into account right from the beginning of the Commission's work.

6. With regard to draft article 7, he was not at all certain whether every breach of an international obligation gave rise to international responsibility in the full sense and set in motion all the draft articles to be elaborated. His doubts could be illustrated by the law of the environment. International norms on the subject had been mushrooming over the past decade, but States had so far accepted essentially primary obligations of prevention: they displayed little or no enthusiasm for secondary norms providing for restitution in kind or financial compensation where due diligence had not been observed. That was evidenced by Principles 21 and 22 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).[5] He was not, of course, maintaining that there should be no responsibility in that field; he merely wished to express his doubts about an automatic connection between responsibility and the duty of reparation, whether in kind or in financial terms.

7. There was in fact already a loophole in the Special Rapporteur's strategy of leaving aside the régime of international crimes. Draft article 7 spoke of the "injured State", which, under paragraph 1, had the right to claim restitution and, under paragraph 4, the right to claim financial compensation in lieu of restitution in kind. The question arose of determining which was the injured State. Article 5 of part 2 of the draft did not draw any distinction between a directly injured State and a State that was only "legally" injured. The provisions of article 5 would in fact have a strong impact on all the provisions that followed. Thus, in the case of a multilateral treaty for the protection of human rights, every other State party could claim to be injured by a violation. From the very outset, therefore, the relationship involved was not merely a bilateral one, a fact that introduced very great difficulties into the topic. In any event, it was plain that a State which had not suffered any material damage could not have the same rights as a State that was a material victim. Article 5 should have elaborated on that distinction.

8. One question was whether the Special Rapporteur would be proposing an article on the subject of interest. Some arbitral awards had granted interest, treating it as an integral component of pecuniary claims, whereas others had not. The Commission might, of course, arrive at the conclusion that the matter was not ripe for codification, but he felt that the point should be examined.

9. With regard to cessation, it might well seem naive to ask whether the primary obligation violated lapsed by virtue of the breach, but the answer should be firmly in the negative. The whole system of international law would be called into question if it were easy to evade international obligations in that way. Except in some marginal cases where compliance with the original obligation was impossible after a given period of time had elapsed, the primary obligation continued to exist.

10. The Special Rapporteur related the duty of cessation to two types of State conduct, actions and omissions. As far as omissions were concerned, the position was simply that the injured State was claiming its right to performance by demanding that the defaulting State should live up to its duties. No new obligation was involved. If enforcement were sought through a judicial procedure, the injured State would not be asserting a right different from that with which the respondent State had failed to comply. It was doubtful whether one could speak in that connection of "cessation". What the injured State expected was simply the performance of the original obligation. He agreed on that point with the remarks made by Mr. Barboza (2102nd meeting).

11. An obligation to cease actions that infringed the rights of other States must be seen in a slightly different light. In particular, such an obligation was found in instances where, through infringement of the prohibition of the use of force or intervention, the sovereign rights of another State had been encroached upon. In a case of that kind, the duty of cessation had specific characteristics which distinguished it from the primary rule concerned. Respect for the sovereign rights of other States could be called a general obligation which constituted the converse of the sovereignty of every State. Sovereignty as such, however, did not give rise to any claim *vis-à-vis* other States as long as it was respected. Only in the course of an infringement did specific, concrete rights come into existence, namely the right of the injured State to request that the unlawful

[4] Adopted at Nairobi on 26 June 1981 (see OAU, document CAB/LEG/67/3/Rev.5).

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

interference be stopped and that any consequential damage be made good.

12. The famous *Trail Smelter* case[6] was a useful example. Canada had always been bound to respect the territorial integrity of the United States of America. Before the Trail Smelter started its noxious industrial activities, however, the United States did not have a specific claim against Canada in that respect. Such a claim originated in the deleterious fumes which crossed the border between the two countries. Another example was the case concerning *United States Diplomatic and Consular Staff in Tehran*, in which Iran's general obligation under article 29 of the 1961 Vienna Convention on Diplomatic Relations had evolved into the specific duty to "immediately terminate the unlawful detention"[7] of the United States personnel. Yet another example was the *Nicaragua* case: in deciding that the United States was under a duty "immediately to cease and to refrain from all such acts"[8] against Nicaragua that had been found to constitute breaches of legal obligations, the ICJ had referred exclusively to actions and not to any omissions on the part of the United States Government. Accordingly, one would be fully entitled to classify the right to request cessation as a "new right", falling under the rubric of secondary rules.

13. In that connection, he wished to draw attention to the case-law of the Court of Justice of the European Communities under article 169 of the EEC Treaty,[9] which was a rich source of inspiration. In the event of a member State of the European Economic Community failing to comply with its obligation to implement directives issued by the Community, and the Court of the Communities then finding that there had been a breach of the Treaty, the State concerned would be required to take appropriate measures for the execution of the judgment. Such a judgment gave rise to a new obligation.

14. Draft article 7 seemed to deal exclusively with the situation in which material damage had occurred. The outline proposed by the Special Rapporteur (A/CN.4/416 and Add.1, para. 20) suggested that cases of a purely legal injury would be dealt with in part 2 of the draft under the heading of "satisfaction" (chap. II, sect. 1 (*b*) (iii)). That point, however, could usefully be stated expressly in the article itself.

15. With regard to material impossibility of restitution, he was by no means convinced that municipal law should be disregarded altogether as being irrelevant. Of course, internal law could not preclude international responsibility, but the obligation of restitution might not extend to certain categories of acts. National judgments, in accordance with article 50 of the European Convention on Human Rights,[10] were a case in point. The Special Rapporteur referred to that problem in his report (*ibid.*, para. 94), yet thought that it should not affect the general rule of restitution. That approach meant that judgments by national courts which embodied a violation of international law had to be set aside or rescinded. Under article 50 of the European Convention on Human Rights, however, if internal law did not permit such action, just satisfaction was to be afforded to the injured party. The reasons adduced by the Special Rapporteur on that point were not entirely convincing. The problem was not whether a State could avoid its international responsibility by invoking municipal law. The issue was confined to the consequences attached to an internationally wrongful act. In the case of a judgment inconsistent with international law, the State concerned could be under an obligation to enforce the international obligation, but it might not be duty bound to set aside the judgment itself. It did have a duty to grant the injured party equitable satisfaction. The whole matter must obviously be examined more closely.

16. The CHAIRMAN, speaking as a member of the Commission, said that he joined other members in congratulating the Special Rapporteur on his rich and well-documented preliminary report (A/CN.4/416 and Add.1), which would give fresh impetus to the Commission's work on State responsibility. Given the growing importance of the topic, it would be helpful if, in future reports, the Special Rapporteur could deal with whole chapters, or at least sections, of his proposed outline for the draft, and if he could also submit his reports some weeks before the Commission's session started.

17. The Special Rapporteur had referred to three points on which he intended to depart from the outline previously envisaged by the Commission. First, the Special Rapporteur intended to make a sharper distinction between delicts and crimes, in order to stress the specific legal consequences of international crimes, and to devote a separate chapter to the legal consequences deriving from an international crime. That approach, which he endorsed, would be helpful in reformulating draft articles 14 and 15 of part 2, which had rightly been criticized by the General Assembly as being inadequate. He agreed that a more carefully elaborated chapter on the legal consequences of international crimes was needed, but it should be drafted in such a way that those consequences were not identified with the infliction of punishment, since it would be dangerous to regard the specific régime of State responsibility for the most serious violations of international obligations as a kind of criminal responsibility. Indeed, the Commission had deliberately avoided that expression from the outset, and it would be advisable to adhere to the same approach. It would also be advisable not to regard the object of countermeasures or reprisals as the infliction of punishment and not to accept punitive damages as a form of reparation. One of the advantages of the previous Special Rapporteur's approach had been that he had managed to avoid those cloudy waters, which were the playground for power politics.

18. Dealing with the legal consequences of international crimes in a separate chapter could cause problems when it came to drafting the articles, since many consequences might well be additional to those already defined in connection with international delicts. The words "in addition" might therefore be a useful tool in avoiding unnecessary,

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[6] For the arbitral awards of 16 April 1938 and 11 March 1941, see United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

[7] Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3, at p. 44, para. 95.3 (*a*).

[8] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits*, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14, at p. 149, para. 292 (12).

[9] See *Treaties establishing the European Communities* (Luxembourg, Office for Official Publications of the European Communities, 1987), p. 207.

[10] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) (United Nations, *Treaty Series*, vol. 213, p. 221).

and otherwise inevitable, repetition. That drafting point could nevertheless be settled when the legal consequences of international crimes had been determined.

19. Secondly, the Special Rapporteur proposed to distinguish between substantive consequences and what he termed procedural or instrumental consequences, apparently taking the view that implementation measures, as hitherto understood by the Commission, could be identified as procedural or instrumental, and that they should be dealt with in part 2 of the draft. The Special Rapporteur also believed that part 3 could be confined to the settlement of disputes.

20. He agreed with the Special Rapporteur that the distinction between substantive and instrumental consequences was not absolute. Thus he could not accept the idea that reparation should be regarded as a substantive consequence and that the right to take reprisals, for example, was to be regarded as merely procedural because it served to secure cessation, reparation and guarantees against repetition. Such a controversial categorization should be avoided and was unnecessary in the draft.

21. Furthermore, reparation and countermeasures, which were consequential rights and had many common features, depended on an established violation of an international obligation, and procedural rules had to be applied in both cases. Reparation was not the only legal consequence of a wrongful act, nor was it the sole content of the relationship called State responsibility. The injured State also had a right, though not an unlimited right, to take countermeasures, which were also the legal consequence of a wrongful act and whose application depended mostly, if not entirely, on the non-fulfilment of the claim for reparation. Countermeasures could also be used to enforce the cessation of a wrongful act, to avert irreparable damage, to induce the other party to accept an agreed dispute-settlement procedure, and so on.

22. He therefore had serious reservations about treating reparation as the only substantive legal consequence of a wrongful act, and countermeasures as merely instrumental or procedural consequences to enforce reparation. That would reintroduce the old civil-law approach to State responsibility and, at the same time, lead to the criminalization of serious violations of international law. The special structure of international law, in which obligations and rules were the product of agreements between States, meant that responsibility must have a specific content involving reparation and the right to countermeasures, both being directed at guaranteeing the original obligation and ensuring compliance with that obligation in the event of a breach.

23. The third point on which the Special Rapporteur intended to depart from the previous outline concerned procedural rules, which were of two different kinds: one related to the implementation of the claim for reparation and the application of countermeasures, and the other to the settlement of disputes. Not only in the case of countermeasures, but also with regard to the claim for reparation, there had to be specific provisions defining the conditions for their application. The previous Special Rapporteur had rightly laid down a procedural condition for invoking reparation to the effect that a State claiming reparation must notify the State alleged to have committed the internationally wrongful act of its claim, and that the notification must indicate the measures required to be taken and the reasons therefor (draft article 1 of part 3). Such procedural rules could well be combined with the rules relating to the settlement of disputes in part 3 of the draft, since any dispute presupposed a claim, and there might be a need to exhaust dispute-settlement procedures at all points in the process under which State responsibility was invoked.

24. Accordingly, to make clear the process whereby effect was given to the legal consequences of an internationally wrongful act, it might be advisable to define the legal consequences in part 2, and the procedure for applying them and for solving any disputes that might arise at any point during that process in part 3. That approach had been followed in the previous Special Rapporteur's draft and by the Commission itself in referring the articles in question to the Drafting Committee. A similar method had also been adopted in sections 3 and 4 of part V of the 1969 Vienna Convention on the Law of Treaties. A different method had, however, been used in other treaties, such as the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities,[11] which contained a detailed description of the procedural steps with respect to implementation of the rights concerned and incorporated the rules on dispute settlement in a separate chapter. There were substantive and procedural aspects to the reparation claim and the right to apply countermeasures that differed from the rules on dispute settlement. He was not altogether happy, therefore, with the distinction drawn by the Special Rapporteur between substantive and procedural legal consequences and with his intention to confine part 3 to rules on dispute settlement. He would prefer to follow the approach adopted thus far by the Commission, concentrating in part 2 on determining the rights and duties that emerged as legal consequences of an internationally wrongful act and combining in part 3 rules for giving effect to those consequences with rules on the settlement of disputes that might arise during that process.

25. In his report (*ibid.*, para. 62), the Special Rapporteur sought the Commission's views on the new draft article 6 of part 2, on cessation, and on its place in the draft. According to the Special Rapporteur, cessation could not be regarded as part of a claim for reparation because the obligation to cease the wrongful conduct was not part of the content of international responsibility deriving from the so-called "secondary" rule, and the provision on cessation should merely emphasize the continued subjection of the wrongdoing State to the primary obligation.

26. Admittedly, a claim for cessation could derive from continuation of the obligation violated, although that was true, in a sense, of the whole relationship under State responsibility: in addition to the obligation violated, rights aimed at securing compliance were created. In his view, however, there was good reason to deal with the claim for cessation of an internationally wrongful act as part of, or at least in close connection with, the claim for reparation. As the Special Rapporteur himself stated, "the truth seems to be that one is confronted in many instances with a combination of remedies, particularly of cessation and restitution in kind" (*ibid.*, para. 49), and quite often measures

[11] *International Legal Materials* (Washington, D.C.), vol. XXVII (1988), p. 868.

taken to make reparation, and particularly restitution, necessarily included cessation of the wrongful conduct.

27. As was apparent from a number of instances in which the Security Council and the ICJ had ordered cessation, it would often be extremely artificial to draw a strict line between cessation and restitution. The decisions he had in mind related, for example, to demands for the withdrawal of South African troops from Angola and of Israeli troops from Lebanon, for the release of political prisoners in South Africa and in Namibia, for the termination of the *apartheid* régime and of the occupation of Namibia, for the immediate release of diplomatic personnel from the United States Embassy in Tehran, and for an end to military and paramilitary acts against Nicaragua. It was clear from such decisions that, whenever a violation extended over a period of time and cessation involved, at least in part, restoration of the legal situation, the claim to stop the violation coincided to a large extent with the claim for restitution. That, however, left the door open to further claims for damages which were often involved when an injunction to cease the unlawful conduct was accompanied by a reference to an obligation to make reparation. Typical examples were the findings of the ICJ in the *Nicaragua* case[12] and in the case concerning *United States Diplomatic and Consular Staff in Tehran*.[13]

28. The fact that claims both for cessation and for restitution were rooted in the continuing existence of the obligation violated did not warrant the conclusion that the very essence of the provision on cessation was to stress the continued existence of the original obligation despite violation. To adopt such an extreme position was to ignore the new aspects contained in the claim for cessation. It was clear from the *dicta* of the Security Council and the ICJ that there was a difference between a general claim for respect for certain rights and a claim for the termination of specific conduct deemed to be in violation of those rights. A claim for cessation was more than just an affirmation of the continuance of the original obligation, since it involved new elements depending on the way in which the right had been violated. Such a claim pointed to a certain line of conduct and implied that that conduct was an internationally wrongful act, as borne out by the fact that cessation could be enforced by sanctions. The importance of new elements in the claim for cessation, which derived from the particular type of unlawful conduct and whose purpose was to stop a particular activity that was in breach of an international obligation, should not be underestimated.

29. A separate article on cessation was certainly justified by the special features of the claim for cessation. In his view, draft article 6 should remain where it was and not be moved to the chapter on general principles. Such a claim was part of, or at least a prelude to, the claim for reparation, and hence it would be wise not to separate it unduly from reparation and to bear the common elements in mind. That would also be in conformity with broad international practice.

30. It was not enough for article 6 to provide solely that the author State remained under the obligation of cessation. He would prefer to stress the new aspect which derived from the continuance and specific form of the obligation. That could be done by a reference to the right of the injured State or States to claim immediate cessation of the wrongful conduct. Admittedly, in the case of a breach of an obligation *erga omnes*, which might be a treaty obligation, all parties could claim cessation of the breach, unless otherwise stipulated by the treaty. He was not maintaining that they could not claim reparation in the sense of legal restitution, but a claim for further material damage would be confined to the victim State which had suffered special harm in addition to the general breach.

31. A further point concerned the limitation of article 6 to wrongful acts "of a continuing character". The Special Rapporteur had used a number of different expressions, including "wrongful acts characterized by duration in time" and "wrongful acts extending in time". The Commission, in the commentary to article 18 of part 1 of the draft, had used the expression "act which extends over a period of time" to refer to three different types of acts: acts of a continuing character; acts composed of a series of actions; and complex acts.[14] To cover those three categories of acts, the expression "act of the State extending in time" was used in the title of article 25 of part 1. He had doubts about the need to retain such a delicate distinction between acts which all extended over a period of time in part 1 of the draft. However, confining the claim for cessation to only one category—continuing acts—would make draft article 6 far too narrow. In the decisions of the ICJ and in the practice of States, claims for cessation had also been recognized in the case of a series of actions and of complex acts. For instance, the Court had not been concerned with whether the laying of mines in the internal or territorial waters of Nicaragua during the early months of 1984, and certain attacks on Nicaraguan territory in 1983 and 1984, constituted a continuing act or a series of actions: it had found a duty to cease and refrain from all such acts forthwith. Since there might often be a situation in which a series of actions or a complex act had to be treated simply as a continuing act, it would be preferable to reword article 6 so as to cover all wrongful conduct extending over a period of time, in the following terms:

> "The injured State has the right to claim from the State whose action constitutes an internationally wrongful act extending in time immediate cessation of the wrongful conduct."

32. The new draft article 7, on restitution in kind, provided a good basis for the work of the Drafting Committee, but it should also answer the question whether the claim was directed at restoring the *status quo ante* or a hypothetical status that would have existed had there been no violation. Inasmuch as the purpose of a claim for reparation was to wipe out the consequences of the wrongful act, the term "restitution" should perhaps not be interpreted so broadly. For practical reasons, and following the example of article 8, paragraph 2 (*a*) and (*d*), of the Convention on the Regulation of Antarctic Mineral Resource Activities,[15] the claim for restitution should be limited to restoration of the *status quo ante*, which could be clearly determined without prejudice to any compensation of *lucrum cessans*.

[12] See footnote 8 above.

[13] See footnote 7 above.

[14] See *Yearbook . . . 1976*, vol. II (Part Two), p. 88, para. (5) of the commentary.

[15] See footnote 11 above.

33. While he agreed with the Special Rapporteur that internal law as such could not be invoked to preclude restitution, some limitations were needed to ensure that a claim for restitution could not be used by aliens to restrict the right of a people to self-determination. He endorsed the approach adopted in paragraph 1 (*c*) and paragraph 2 of draft article 7, although the wording could be improved.

34. Lastly, paragraph 4 of article 7, under which the freedom of the injured party to choose compensation instead of restitution would be restricted if such a choice involved a breach of an obligation arising from a peremptory norm, should also refer to cases in which it involved a breach of an obligation *erga omnes* arising out of a multilateral treaty that would therefore affect the rights of the other States parties to the treaty. That point, to which the Special Rapporteur referred in his report (*ibid.*, para. 113), should not be left to the chapter on the legal consequences of crimes.

35. Mr. BARSEGOV thanked the Special Rapporteur for his very detailed and interesting preliminary report (A/CN.4/416 and Add.1), which was evidence of a high level of professionalism and sophisticated legal thinking. Since he was addressing the Commission on the topic of State responsibility for the first time, he felt he should point out that his own approach, and that of Soviet doctrine, to the question of State responsibility for internationally wrongful acts was based on the policy of strengthening international legality and the rule of law, a policy which had achieved new prominence since the Soviet Union had embarked on its programme of *perestroika*. It was that concern which explained his dissatisfaction with the slow pace of progress on the topic within the Commission: little had been achieved in the previous two years, and no substantial progress could be expected from the current session.

36. In submitting the new draft articles 6 and 7 on cessation and restitution in kind for part 2 of the draft, the Special Rapporteur had asked the Commission to confine its deliberations to international delicts, although the articles were so formulated as to apply to all internationally wrongful acts. That approach, he had explained, was merely a *modus operandi* based on the fact that the legal consequences of delicts were less problematic and constituted a more familiar subject. Although the report made reference to the advantages of such an approach—which it was, of course, the Special Rapporteur's prerogative to adopt—it was silent as to its obvious negative aspects, and he shared Mr. Roucounas's doubts (2103rd meeting) as to the appropriateness of making an artificial division in the consideration of the draft articles by discussing delicts alone without reference to crimes. Delicts were defined by reference to crimes: according to paragraph 4 of article 19 of part 1 of the draft, already adopted on first reading, international delicts were those internationally wrongful acts which were not international crimes. The consequences of a crime, on the other hand, must be defined in terms of the consequences of delicts, using the formula by which the consequences of a crime were the consequences of a delict plus those deriving from the applicable law.

37. Each type of wrongful act had its specific consequences which, depending on the case, could be distinguished not only according to their gravity, but also—and primarily—according to their nature and subject. If such differences were not taken into account, difficulties would arise in selecting remedies and, more importantly, in defining the substance of such remedies in the light of real situations.

38. The approach adopted might have the effect of dragging out the Commission's work on the topic, which would be regrettable at a time when the international situation offered an opportunity for the further strengthening of international legality and the rule of law.

39. In his view, a distinction should not be drawn between delicts and crimes, both of which were infringements of the norms of international law differing only according to scale or gravity. To confine the discussion to delicts, without dealing with problems common to all wrongful acts, would be difficult, not to say impossible.

40. In practice, all national penal codes were constructed on the following pattern: first the constitutive elements of the offence were indicated, and then, depending on the degree of gravity, the penalty was provided. Such a procedure in the present context would be difficult and time-consuming, but would ultimately justify itself. However, as every approach had its advantages and its drawbacks, it was up to the Commission to do its best using the approach adopted by the Special Rapporteur.

41. Turning to the specific issues raised by the new draft articles, he said that in his view the cessation of a wrongful act presupposed the need to determine the legal significance of cessation and to distinguish it as a legal remedy. He wished to emphasize the obligation of a State which had committed a wrongful act and of the right of the injured State and of the international community of States to demand cessation of the act.

42. The concept of responsibility in international law was based on the emergence of a new secondary obligation which consisted of the redress by the State committing the wrongful act of the situation resulting from that act, in other words the elimination of its consequences. That obligation implied the fullest compliance with the primary obligation, i.e. it did not entail the disappearance of the primary legal relationship in the form of the specific right of one party and the specific obligation of the other, which existed prior to the commission of the wrongful act. A breach of the law did not lead to the extinction of the law itself. It was precisely on the basis of that subjective right and the norms underlying it that the requirement arose of reverting to the primary obligation in order to eliminate the situation of a breach. Without such a legal foundation it would be difficult to speak of an obligation to discontinue the wrongful conduct.

43. Cessation of a wrongful act or of a crime as a distinct remedy was closely linked to the possibility of subsequent restitution, punishment or sanctions. The link between the cessation and restitution and other remedies would become clearer if a distinction were drawn between the actual cessation of the wrongful act itself and the juridical cessation of the state of breach, delict or crime, which intervened only after a full settlement of the issue, which might include restitution or other legal remedies.

44. While the distinction between cessation of the wrongful act and other remedies was relative, he agreed

with the Special Rapporteur that it had its positive aspect, which consisted mainly in the discontinuance of the harmful consequences of the act and the reduction of their scope. Obviously, the graver the wrongful act or crime, the more important it was to secure its prompt discontinuance.

45. The need to cease a wrongful act, especially a wrongful act of a continuing character, resided, in the Special Rapporteur's view, in the fact that any wrongful conduct, apart from having obvious direct and specific injurious consequences detrimental to the injured State or States, was a threat to the very rule infringed by the unlawful conduct. In other words, the norms of international law developed by States themselves were all the more vulnerable for being exposed to destruction as a result of violations by States. That was why the remedies under consideration were so important and why the significance of cessation of a wrongful act went beyond the level of bilateral relations to the level of relations between the wrongdoing State and all other States as members of the international community.

46. The Special Rapporteur seemed to place the obligation to cease a wrongful act somewhere "in between" primary and secondary rules. In the Special Rapporteur's view, cessation of the wrongful act must be related, both as an obligation and as a remedy for breaches of international law, not to the effect of a so-called secondary rule which acquired legal force by virtue of the commission of the wrongful act, but to the continuous and normal effect of the primary rule violated by the wrongful conduct. That was a position with which it was possible to concur, provided it was recognized that the processes concerned were linked and that they paralleled each other. The obligation to cease the wrongful act was the other side of the obligation to behave in a specific way. In other words, the rule "Behave properly" might be expressed in the form "Do not behave improperly".

47. The natural conclusion was that, in the interests of enhancing the effectiveness of legal remedies for a wrongful act, it would be appropriate if cessation of the breach and *restitutio in integrum* were retained as two distinct but interrelated categories of remedy for a breach of the rules of international law or of international obligations.

48. The provisions of draft article 6, on cessation, could be accommodated in chapter I (General principles) of the proposed outline for part 2 of the draft (A/CN.4/416 and Add.1, para. 20), but might perhaps be more appropriately left in chapter II. At the same time, it was necessary to specify the legal meaning of cessation: article 6 seemed to limit itself to its factual aspect.

49. The Special Rapporteur had linked the issue of the restoration of a legal situation to restitution, pointing out in paragraph 3 of draft article 7 that no obstacle deriving from the internal law of the State which committed the internationally wrongful act might preclude by itself the injured State's right to restitution in kind.

50. Such elementary issues as the nature of cessation should not be neglected. The draft articles should contain a provision to the effect that restoration of the situation that had been violated presupposed not only the factual discontinuance of the act, but also abrogation of the illegal formal acts, both international and national, which were based on the breach of international law. Those acts should be regarded as having no legal validity *ab initio*. National laws, administrative regulations and court decisions which infringed the rules of international law were subject to abrogation, annulment or amendment. Such an approach was based on recognition of the primacy of international law over internal law and on the premise that the international obligations of States took precedence. From that point of view as well, the provisions of paragraph 3 of draft article 7, although unobjectionable in themselves, were not enough.

51. If the question of cessation seemed relatively simple, the same could not be said of restitution. Specific problems arose from the private-law form of the institution, which led in his view to some confusion between the notions and institutions relevant to legal relations of a public character and those relevant to private civil law. Although he had reverence for the legal genius of Rome and the highest regard for Roman civil law, the possibility of importing the concepts of that law into the totally different area of inter-State relations had its limits as considerable difficulties would arise with respect to the content of those concepts.

52. It was not clear whether restitution would also apply to international crimes. If restitution broadly meant restoration of the situation which existed before the breach, the question arose whether its implications were purely material, financial or property-related, or could it assume public-law or politico-legal dimensions? It was therefore important to clarify what types of State responsibility were involved, and what was the subject of restitution. It should be borne in mind that, in doctrine, a distinction was made between two forms of responsibility: material and non-material. The Commission would have to recognize that, in real situations, the reparation of a breach would involve taking into account a variety of specific circumstances which did not find material expression in the narrow sense of that term.

53. One solution would be to distinguish between material and legal restitution; but it was important to understand the purpose of such a distinction, and what was intended by the notion of legal restitution. Resolving such issues called for a unified concept based on the fact that the forms of responsibility constituted a means by which the legal situation violated by the wrongful act was to be restored, and that the form was determined by the nature of the wrongful act.

54. In the case of annexation, for example, would the return of State territory to an injured State constitute restitution in kind? And what were the implications of the concept in the case of such internationally wrongful acts as genocide, the forcible transfer of a population or changes to the demographic composition of a foreign territory? In such instances, would financial compensation be regarded as an adequate form of restitution in kind? How could the dead be brought back to life? Should a State having committed the crime of genocide be given as a bonus the territory of the people which it had reduced to the condition of a minority through the commission of that crime? The law was often silent on such issues because the applicable rules had not yet been drawn up. The Commission's aim should be to establish rules that could be invoked in such situations.

55. Similar problems arose with regard to international delicts. Everything depended on what kind of international

obligations had been violated and on whether the case involved situations such as the seizure of a vessel or the arrest of a foreign citizen, or the extremely complex legal problems raised by the politico-legal relations between States. Such problems merited specific study and should be taken into account when formulating the general rule.

56. It had been decided not to consider questions relating to international crimes, but the effect of ignoring them might be to render the exercise abstract, remote from reality and prone to distortion.

57. On the question of the scope of restitution, he said that he would be in favour of according it a broader and more comprehensive function as a legal remedy. There were many possibilities for new approaches in that respect, provided the issue was not confined within the bounds of the rules and institutions of civil or Roman law. In addition, attention should be drawn to the need for a reciprocal relationship between restitution and an actual breach of the law, which would exclude the possibility of recourse to the institution of restitution as a means of political pressure. That should not, however, enable a State which had committed an internationally wrongful act to evade its responsibility on the grounds that recourse to restitution would pose a serious threat to its political, economic or social system.

58. Mr. PAWLAK, referring to the general plan for the topic adopted by the Commission at its twenty-seventh session, in 1975,[16] said that the results of the Commission's work on part 1 of the draft, dealing with the origin of international responsibility, were very positive, and he supported the principles defined in chapter I of part 1. Articles 1, 3 and 4 thereof represented significant progress in codifying the basic rules of State responsibility.

59. However, the principles in part 1 did not by any means exhaust the wealth of customary international law deriving from State practice and from the decisions of international courts. Every State had its own rights and obligations, and a breach of an obligation entailed responsibility for that State. Likewise, every State had a duty to respect the rights of other States, and a corresponding right to demand that other States respect its own rights. In its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, the ICJ had recalled the finding of the PCIJ that "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form".[17] It could therefore be inferred that even the much-valued part 1 of the draft warranted thorough review by the Commission on second reading, so as to ensure that the articles reflected the principles and norms which now applied both in customary international law, such as contemporary State practice and United Nations practice, and in international treaty law, such as the Vienna conventions adopted after the Chernobyl disaster.

60. As for part 2 of the draft, on the content, forms and degrees of international responsibility, he endorsed the Special Rapporteur's general approach. On the whole, the innovations introduced and the changes made to the method followed by the previous Special Rapporteur seemed logical. He did not fully agree with the proposal to deal separately with the legal consequences of international crimes and of international delicts, although it might help to accelerate the Commission's work on the draft articles. The Special Rapporteur's proposed distinction between the rights and obligations of States pertaining to cessation and to various forms of reparation could be adopted as a working hypothesis for the time being. He could also accept the Special Rapporteur's arguments in favour of devoting the whole of part 3 of the draft to dispute settlement.

61. The new draft articles 6 and 7 formed the first stage in the new outline of part 2 proposed by the Special Rapporteur in his preliminary report (A/CN.4/416 and Add.1, para. 20). They required thoughtful analysis, both from the conceptual point of view and for the purpose of uniformity in drafting. It was disappointing, however, that only two articles had been submitted to the Commission so far.

62. From a comparison of the new article 6 with paragraph 1 of draft article 6 as submitted by the previous Special Rapporteur, it could be seen that cessation now emerged as a separate legal concept. The previous Special Rapporteur had proposed, in effect, that the discontinuance of the internationally wrongful act should be left to the decision and competence of the injured State, whereas the present Special Rapporteur was seeking to place a general obligation on States to cease an action or omission which constituted an internationally wrongful act. That approach could lead to the conclusion that the obligation of cessation was not a legal consequence of an international delict or crime, and that it should be treated as a general principle of State responsibility. If so, it should be placed in part 1 of the draft and be formulated accordingly. A rule of cessation was important both for the injured State and for other States with an interest in relying on and preserving the relevant primary rule of international law.

63. He agreed, on the whole, that cessation should cover any wrongful act extending in time, not only delicts. Hence he could not entirely agree with the Special Rapporteur that there could, in practice, be separate rules of cessation for international delicts and for international crimes. The same approach should be adopted to cessation of both kinds of internationally wrongful acts.

64. The Special Rapporteur seemed to be concerned in the new draft article 7 only with the material aspect of State responsibility. A much broader approach was needed. State practice drew a ready distinction between political, material and moral responsibility for internationally wrongful acts committed by States. From a political point of view, a State that was injured by an internationally wrongful act might take non-material steps, such as breaking off diplomatic relations with the author State. Violations of international law might themselves have political, material or moral dimensions. During the Second World War, millions of people had been forcibly taken to Germany from occupied territories to be used as forced labour. Material compensation for those crimes had not been fully made even now, yet to confine restitution for them to their material dimension would be quite insufficient. Acts of aggression, being the most serious violations of international law, had consequences more far-reaching than material reparations. The victorious States

[16] *Yearbook . . . 1975*, vol. II, pp. 55 *et seq.*, document A/10010/Rev.1, paras. 38-51.

[17] *I.C.J. Reports 1949*, p. 174, at p. 184.

in an armed conflict might impose limitations on the sovereignty of the defeated State, for example by occupying its territory, securing reparations, and introducing measures designed to eliminate the aggressive forces in that State. Such measures could create conditions whereby the defeated State would, in future, be enabled to conduct a peaceful policy in accordance with international law. All such non-material aspects should be taken into account in drafting the articles of part 2 and the problem of *restitutio in integrum* should certainly not be confined to its material aspects.

65. Mr. ARANGIO-RUIZ (Special Rapporteur) thanked members for the comments made so far. Some of them related to points which were not covered in his preliminary report (A/CN.4/416 and Add.1) but would be amply dealt with in his second report, which he intended to submit during the present session. The second report would contain chapters on reparation by equivalent, satisfaction, and guarantees of non-repetition. He also hoped to touch on the problem of fault, and the extent to which both fault and damage were involved in questions of reparation.

66. There would have been no reason to deal expressly with moral damage in the new draft article 7. However, the article did refer to "injuries", which included any kind of damage or loss, whether material or moral, suffered by the nationals of the injured State. Moral damage to a State itself was also covered by the provisions on *restitutio*, and would be emphasized in the second report. It was not correct, therefore, to say that restitution for moral injuries had been omitted. Nor was it correct to assert that the articles on cessation and restitution ruled out the environment as a subject of protection under the rules of State responsibility. Environmental protection was a topic that should certainly be submitted for inclusion in the Commission's long-term programme of work and it must take pride of place among the topics chosen for the progressive development and codification of international law. It had also been said that the preliminary report and the new articles proposed did not cover the problem of interest, but that was clearly a matter to be dealt with in conjunction with pecuniary compensation and not in connection with *restitutio in integrum* as defined in the report. As for the remark made by one member concerning human rights, he failed to understand what exactly it meant in relation to the report and draft articles under discussion.

67. The timing of his reports had admittedly been unsatisfactory, at both the previous and present sessions. However, there were inherent difficulties, well known to members of the Commission, in the progressive development and codification of topics of international law. Many years had elapsed between the start of the work on codifying the present topic and the adoption of part 1 of the draft on first reading. Moreover, the parts of the draft entrusted to the previous Special Rapporteur, Mr. Riphagen, and to himself were undeniably the most difficult. Whereas part 1 had tackled that "static" aspect of the topic which was the definition of internationally wrongful acts, parts 2 and 3 were intended to cover the consequences of such acts, namely the essential core of the rules of State responsibility and their implementation. An example—just one among many—was notably the distinction between delicts and crimes. While that distinction had been easy to formulate in article 19 of part 1, it became much more problematic when one had to determine, in parts 2 and 3, the rules covering the specific consequences of the acts qualified as crimes and the implementation of those consequences. The only conclusion so far reached by both his predecessor and himself was that the régimes governing delicts and crimes were the same up to a certain point, but neither of them had been ready to determine the point at which those régimes differed. State practice and doctrine offered little guidance on the consequences of international crimes.

68. It was most unlikely that, in the third (1990) report, he would be able to advance as far as draft article 15 of part 2 and the five draft articles of part 3. Any attempt to do so would inevitably be flawed by insufficient study of the relevant doctrine, jurisprudence and diplomatic practice. Practice was notably sparse on the matter of satisfaction. The decision lay with the Commission: either it could allow sufficient time for the study, or it could decide to expedite the drafting of the articles, in which case little significant progress would be made in the progressive development and codification of the topic. As for the forthcoming second report, it would focus on the substantive consequences of internationally wrongful acts, as distinct from measures or countermeasures taken by the injured State.

69. He agreed that the exact definition and theory of cessation were not easy matters and that it was not entirely clear where cessation should be placed in the draft. It should, however, be distinguished from the questions of *restitutio in integrum*, reparation by equivalent, satisfaction and guarantees of non-repetition.

70. Mr. BARSEGOV asked whether the Special Rapporteur would agree that it would be more logical not to refer the new draft articles to the Drafting Committee until the work on related questions had also reached draft form. Secondly, he wondered whether the Special Rapporteur intended, in his further work, to include specific examples of international crimes such as those listed in paragraph 3 of article 19 of part 1 of the draft.

71. Mr. EIRIKSSON asked whether the Special Rapporteur intended to cover the role of reprisals in the next stage of his work.

72. Mr. ARANGIO-RUIZ (Special Rapporteur), in reply to Mr. Barsegov, said that, since the Drafting Committee already had before it the previous draft articles 6 and 7, it would be best to refer the new ones to it as well. When the Committee was ready to deal with them, it would have before it also the draft articles submitted in the forthcoming second report, namely those on pecuniary compensation, satisfaction and guarantees of non-repetition. The Committee would have sufficient material to work on. Secondly, on the question of specific crimes, it was not yet clear how crimes of State were to be defined in relation to State responsibility, although cessation was even more important for crimes than for delicts. Certainly he intended to include examples of international crimes, such as wilful damage to the environment.

73. As to Mr. Eiriksson's question, reprisals would be covered in the third (1990) report, together with measures—a term which he preferred to "countermeasures".

74. The CHAIRMAN queried, along the lines of Mr. Barsegov's question, whether there was any purpose in

referring to the Drafting Committee articles which might be wholly altered.

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

[Agenda item 9]

75. The CHAIRMAN announced that the members of the Working Group to consider the Commission's long-term programme of work (see 2095th meeting, para. 24) would be Mr. Al-Khasawneh, Mr. Díaz González, Mr. Mahiou, Mr. Pawlak and Mr. Tomuschat. The Working Group would elect its own chairman and would submit a report in due course to the Planning Group.

76. Mr. KOROMA said that he would prefer to have been consulted before the membership of the Working Group was decided.

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

[Agenda item 1]

77. The CHAIRMAN said that the Commission would be able to revert the following week to the question of the list of war crimes to be included in the draft Code of Crimes against the Peace and Security of Mankind (see 2102nd meeting, para. 39).

The meeting rose at 1.05 p.m.

* Resumed from the 2095th meeting.

2105th MEETING

Friday, 19 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/416 and Add.1,[1] A/CN.4/L.431, sect. G)

[Agenda item 2]

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

Parts 2 and 3 of the draft articles[2]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 6 (Cessation of an internationally wrongful act of a continuing character) *and*

ARTICLE 7 (Restitution in kind)[3] (*continued*)

1. Mr. THIAM said that he would confine his remarks to three aspects of the topic: injury, the distinction between international crimes and international delicts, and the cessation of the internationally wrongful act.

2. With regard to injury, it might be asked what place the Special Rapporteur was assigning to it in the draft. The articles first proposed on the subject had sparked off considerable controversy, which had since abated but had not wholly died down. The Special Rapporteur was, so to speak, on a moving train and found himself at a stage in the work where it was appropriate to raise the problem once again. He was suggesting an outline for part 2 of the draft (A/CN.4/416 and Add.1, para. 20), but that part should begin with some provisions on the concept of injury, so as to link up with part 1. The transition from part 1 to part 2 was based on the concept of the injured State, and that presupposed that injury had occurred, although no provision dealt with the nature, characteristics or limits of such injury. It would be advisable for the Special Rapporteur to clarify his position on that point.

3. In part 1, the distinction between an international crime and an international delict had been made for the purposes of analysis and classification. There was, however, no clear-cut dividing line between the two concepts, especially from the point of view of the consequences. Some consequences were common both to crimes and to delicts, but there were others that were peculiar to crimes. It was the common consequences that should therefore be dealt with first: the obligation to discontinue the wrongful act, in the case of a continuing breach or an act of a repetitive or complex nature; and the obligation to provide reparation, in its various forms, namely *restitutio in integrum*, compensation or satisfaction. In the case of the consequences peculiar to crimes, there were, above all, effects *erga omnes*: the obligation to withhold legal recognition from the situation brought into being by the crime (occupation, annexation, etc.); the obligation not to lend assistance to the author

[2] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook . . . 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[3] For the texts, see 2102nd meeting, para. 40.

State; and the obligation to assist the injured State. In the case of aggression, there would also be all the rights and obligations provided for in the Charter of the United Nations. If the Special Rapporteur pursued an approach based on a dividing line between the two categories, the result would inevitably be overlapping or repetition.

4. He therefore proposed the following outline for part 2: (1) consequences common to crimes and delicts: cessation, *restitutio*, reciprocal measures, reprisals, etc.; (2) consequences peculiar to international crimes: effects *erga omnes*. That was, moreover, what the previous Special Rapporteur had proposed in article 2 of part 2 as provisionally adopted by the Commission, which stated:

> . . . the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

Consequently, draft articles 14 and 15 of part 2 dealt specifically with international crimes. He therefore reserved his position on the method proposed by the present Special Rapporteur until the remaining articles had been drafted.

5. Turning to the new draft article 6 on cessation of an internationally wrongful act of a continuing character, he recalled that the Commission had held some very intricate discussions on the nature of that concept: was it a primary obligation, a secondary obligation or a legal formula *sui generis*? In any event, there was still the problem of where to place the article in question within the overall structure of the draft. In his own view, it should remain in part 2: first, because cessation occurred after, and was thus consecutive to, the commission of the wrongful act; and, secondly, because it might be difficult to establish a dividing line between cessation and certain other concepts, such as *restitutio in integrum*. If, for example, the crime in question was the occupation or annexation of a territory, the end of such occupation or annexation was a form of *restitutio*. It therefore appeared that cessation fell more properly within the part dealing with the legal consequences of responsibility.

6. As for the new draft article 7, which defined the basic principles of restitution and listed a number of exceptions, it was a direct application of existing law. It could be accepted in the form proposed, subject to possible drafting changes.

7. Mr. SEPÚLVEDA GUTIÉRREZ welcomed the precision of the Special Rapporteur's preliminary report (A/CN.4/416 and Add.1) and the wealth of detail it contained, for, in view of the difficulty of the topic, those qualities were essential to the drafting of provisions that would be acceptable to the international community. The Commission was now in a position to define a set of basic principles relating to the modern forms of State responsibility.

8. In general terms, he agreed with the outline tentatively proposed by the Special Rapporteur for parts 2 and 3 of the draft (*ibid.*, para. 20), despite the distinction between the legal consequences of delicts and the legal consequences of crimes. The outline would at least enable the Commission to make progress in its work, without prejudice to the possibility of removing that distinction at a later stage.

9. In his report (*ibid.*, para. 3), the Special Rapporteur referred to the possibility of improving draft articles 6 and 7 of part 2 as submitted by his predecessor, particularly in view of the undue significance which the previous Special Rapporteur had attached to the treatment of aliens (art. 7). In that connection, he recalled that the question of the treatment of aliens had given rise to a great deal of controversy and that some bitter memories were still associated with the functioning of the mixed claims commissions.

10. He did not think that a distinction should be made between a "primary" obligation and a "secondary" obligation because that only confused matters, as Mr. Barboza (2102nd meeting) and other members had already said.

11. The new draft articles 6 and 7 were acceptable, subject to a few reservations. In article 6, the idea of "a continuing character" was not convincing: in any event, it was much less clear than the Special Rapporteur thought, as Mr. Graefrath had rightly pointed out (2104th meeting). There was also the problem of where article 6 should be placed in the draft. Mr. Calero Rodrigues (2103rd meeting) had suggested that it could be included under "General principles" in chapter I of part 2; that would be an excellent solution because its inclusion in the provisions on reparation would only complicate matters.

12. In draft article 7, the Special Rapporteur had made commendable efforts to maintain an equitable balance between the interests of the author State and those of the injured State. The article was thus acceptable in terms of principles, but it could deal more specifically with the problem of the nationalization of foreign property, which was a very frequent occurrence at the present time.

13. Paragraph 2 (*b*) of article 7, according to which restitution in kind would be deemed to be excessively onerous if it seriously jeopardized the political, economic or social system of the State bound to make restitution, was not explicit enough. If a State was compelled to nationalize foreign property to secure the well-being, or even the survival, of its population, that circumstance should be counted as one that mitigated or precluded its responsibility, as Mr. Mahiou (*ibid.*) had so rightly said.

14. Paragraph 3 went quite far in providing that no obstacle in internal law could preclude the injured State's right to restitution in kind. There were, however, certain inviolable principles of internal law which, by the very nature of things, had to be respected. Moreover, any peremptory rule of that kind would make it difficult for some States to accept the draft articles. No doubt specific exceptions would be provided for, but he reserved the right to return to the question.

15. Quite properly, the Special Rapporteur intended to devote part 3 of the draft to the peaceful settlement of disputes. That area of the law was often bedevilled by political considerations; it called for an innovative approach to bring about speedy and acceptable solutions which would not merely promote a quicker end to disputes, but also protect the interests of weaker parties and foster peaceful and constructive international relations.

16. He was not wholly persuaded by the distinction the Special Rapporteur drew between "direct" and "indirect" responsibility or by his comments on the exact point at which one State became responsible and another State

became entitled to claim reparation. He would revert to those questions, too, at a later stage.

17. In his view, draft articles 6 and 7 could be referred to the Drafting Committee.

18. Mr. HAYES said that the new draft articles 6 and 7 submitted by the Special Rapporteur in his preliminary report (A/CN.4/416 and Add.1) were a welcome improvement on the previous articles as they were more detailed and elaborate, but they raised a question of methodology. Although the consequences of an international delict and the consequences of an international crime should be considered separately, a final decision should not be taken yet on how they should be dealt with structurally within the draft—whether in separate provisions or by the "in addition" approach favoured by the previous Special Rapporteur.

19. The subject of cessation, dealt with in draft article 6, had given rise to a very learned exchange of views on the question whether, as the Special Rapporteur maintained, cessation differed from reparation, the former being regarded as related to the "primary" rule and the latter to the "secondary" rule (*ibid.*, para. 31). Several considerations had emerged from the debate. In the first place, it was difficult to fit concepts such as those into watertight compartments, as might be desirable in the interest of the tidiness of the text. Secondly, efforts in that direction were not facilitated by the fact that, in State practice, the injured State was more concerned to invoke a combination of remedies than a separately distinguished individual remedy. Thirdly, even the courts were more concerned with determining remedies than with distinguishing the bases for them. Lastly, as the Special Rapporteur himself noted (*ibid.*, para. 48), the same action could in some cases have the character both of cessation and of restitution in kind, as had been seen in the case concerning *United States Diplomatic and Consular Staff in Tehran*.[4]

20. The question must, however, be at least partially resolved. The Special Rapporteur's arguments were the more persuasive, particularly his conclusion that a rule on cessation could be conceived as a provision situated "in between" the primary and the secondary rules (*ibid.*, para. 61). From either standpoint, a specific rule on cessation was an essential element in the draft articles and should be separated from the provisions on reparation. That did not mean that it should be placed in part 1 of the draft, as some had suggested, for then it would be too far removed from the section on reparation. It would be better, as the Special Rapporteur had suggested, to include that rule under a different heading in part 2.

21. Restitution in kind (*restitutio in integrum*) was, as stated in the report, a "secondary" obligation. Moreover, restitution must have primacy over the other forms of reparation (*ibid.*, paras. 114 *et seq.*). That primacy, which arose out of the very nature of *restitutio*, was not so easily proved from practice and the authorities offered different views on whether it meant the restoration of the *status quo ante* or the establishment of the situation as it would have been had there been no wrongful act. In his view, the Commission should adopt a definition of restitution which conformed to the latter meaning, even if it involved progressive development. There would then be, as the Special Rapporteur said (*ibid.*, para. 67), an "integrated" concept of restitution in kind within which the restitutive and compensatory elements were fused.

22. The Special Rapporteur considered three grounds of legal impossibility to make restitution on the part of the author State and dismissed two of them. It could be accepted, of course, that a rule of *jus cogens* would constitute an impossibility. An obligation to a third State or a provision of domestic law could not in principle justify a State evading the obligation to make restitution, but those cases should be examined more closely. In the first of those two cases, a State must ensure that it did not incur conflicting obligations to two other States. Neither of those two States would agree to forgo restitution on the grounds that it was in competition with the other. Assuming, however, that State A found that it could not provide *restitutio in integrum* to State B without violating an obligation to State C giving rise in turn to a second and conflicting right of State C to *restitutio in integrum*, that was a situation of impossibility in a practical sense. If such a situation could arise in practice, it must be considered.

23. The Special Rapporteur adverted to another obstacle to *restitutio* in noting (*ibid.*, para. 90) that, despite the principle that domestic jurisdiction could not affect the international obligations of a State, a Government might find itself bound by a legal rule, perhaps in the form of a constitutional provision or supreme court decision, which it could not change, at least retroactively. Again, it could be said that it was up to the State not to place itself in that position: none the less, the possibility had to be considered.

24. Both of those problems related to the principle, perfectly defensible in itself, that the choice between remedies lay with the injured State, subject only to impossibility or excessive onerousness. He wondered, however, whether excessive onerousness would make for a solution. If the dominant factor in assessing excessive onerousness was the gravity of the violation or the injury, that might very often preclude it as a solution to those problems. If, on the other hand, the obstacles to which he had referred were to override the concept of gravity, they would in effect achieve the status of impossibility. Those were problems which complicated the task, but which must be resolved.

25. He agreed that particular categories of wrongful act should not be singled out and consequently considered that draft article 7 as submitted by the previous Special Rapporteur, on the case of aliens, should be deleted.

26. With regard to the new outline for parts 2 and 3 of the draft proposed by the Special Rapporteur (*ibid.*, para. 20), he said he felt that, as a general rule, members should bow to the wishes of a special rapporteur with respect to the methodology he favoured for his research and presentation to the Commission. In any event, the outline afforded a very sensible basis for the continuation of the work, without prejudice to the final organization of the draft articles. However, he maintained the reservation he had made with regard to separate treatment of the consequences of international delicts and those of international crimes. He made the same reservation with regard to the location of the provisions on implementation, which was not just a matter of methodology. He enquired whether those provisions were intended to be covered by chapter IV (Final provisions) of the outline for part 2.

[4] See 2104th meeting, footnote 7.

27. He hoped to speak more generally on the topic at another time.

28. Mr. YANKOV thanked the Special Rapporteur for drawing attention in his preliminary report (A/CN.4/416 and Add.1, para. 20) to the outline he contemplated for parts 2 and 3 of the draft. In a matter of such complexity, it was important to have an idea in advance of what the draft as a whole would be. Also, the Sixth Committee of the General Assembly had asked the Commission to adopt that procedure for all the topics it considered.

29. In the case of a topic which the Commission had been considering for more than 30 years, however, a more detailed outline might have been expected. The outline also lacked balance, for, while the presentation of some of the elements was fairly specific, that of others was very sketchy. There were also differences in some of the headings in part 2: for example, chapter II, section 1, referred to "substantive rights", whereas chapter III, section 1, referred simply to "rights". Were those differences intentional? Lastly, while it seemed that the distinction between international crimes and international delicts could be justified to some extent, the question arose whether the legal consequences arising out of both were so significant as to warrant their presentation in two separate chapters. Even if it were decided to retain that distinction, they could perhaps simply be dealt with in separate articles in the same chapter. The proposed outline was not open to criticism in itself, but it was important not to create undue expectations with regard to the content of chapter III.

30. Two questions arose with regard to the new draft article 6 of part 2. Did the cessation of a wrongful act have a function which distinguished it from all the other forms of reparation so that it deserved to be formulated in a separate article? And, if so, where in the draft should the article be placed? He agreed with the Special Rapporteur that, despite the fact that in common with other forms of reparation cessation had a remedial function, it also had specific features peculiar to it. Nevertheless, it was important not to go too far by establishing distinctions between cessation and other forms of reparation which were, as Mr. Hayes had pointed out, often disregarded in State practice and jurisprudence. The report did state (*ibid.*, para. 49) that cessation was in practice sometimes combined with other forms of reparation, but perhaps that point should be emphasized further. Another point that should be emphasized was that, in the continuing character of a wrongful act, duration *per se* was not the decisive factor, and that the obligation of cessation could arise immediately after the act had been committed, for example when the Security Council decided that, as a preliminary measure, an armed conflict should be discontinued.

31. With regard to the actual wording of article 6, several members had suggested that it should be further developed on the basis of paragraph 1 (*a*) of draft article 6 as submitted by the previous Special Rapporteur. He himself considered that the earlier text had made it clearer that the injured State had certain rights and that those rights were matched by certain obligations on the part of the State which had committed the wrongful act. The new text, which included the words "remains . . . under the obligation", tended to underline the continuing character of the obligation. Otherwise, he approved of the new article 6 and, while he saw some merit in the arguments adduced for placing it in chapter I of part 2, on general principles, he was of the view that it should be left in chapter II, on the legal consequences of international delicts.

32. Turning to the new draft article 7, he said he agreed that restitution in kind was one of the forms of reparation and that the obligation of restitution derived from a secondary rule. The Special Rapporteur had provided a commendable analysis of doctrine and jurisprudence on the question, although many of the extracts he had quoted were definitions and therefore of greater theoretical than practical interest. In fact, whether restitution in kind was defined as the re-establishment of the situation which had existed prior to the wrongful act or as the re-establishment of the situation which would have existed if the wrongful act had not been committed, it could be considered that, from the point of view of reparation, the final result would be the same. While the importance of legal theory should not be underestimated, it should not be forgotten that the Commission's task was to establish rules of public international law whose purpose was to govern relations between States.

33. In addition, the draft articles related not only to international delicts, but also to international crimes, as defined in paragraph 3 of article 19 of part 1 of the draft, in other words to serious violations of international obligations of essential importance for the maintenance of international peace and security, for safeguarding the right of peoples to self-determination, for the protection of the individual and for the protection of the human environment. In all such cases, restitution would be very broad in scope and content and it was not enough merely to take account of its material aspects. Admittedly, the Special Rapporteur had pointed out that subsequent articles would make provision for other modes of reparation, but, even in the context of restitution in kind, the analysis should be carried further. The Special Rapporteur was also right to state that, despite certain specific legal characteristics, restitution in kind was one way of fulfilling the secondary obligation of reparation in the broad sense and that, while it must be distinguished from the other modes of reparation, and particularly cessation, the links between all those elements must not be overlooked.

34. Draft article 7 constituted a sound basis for the Commission's work, but it could not be determined whether its provisions were comprehensive enough until it was known what the content of the draft articles relating to the other forms of reparation would be. Nevertheless, he could certainly state that he attached great importance to the provisions of paragraph 2 and, in particular, to subparagraph (*b*), which might, in his opinion, be in the nature of a public policy provision that would make restitution in kind legally impossible if it seriously jeopardized the political, economic or social system of the author State.

35. Mr. Sreenivasa RAO said that, as a relatively new member of the Commission speaking on a topic as complex as State responsibility, he thought it appropriate, before considering some specific aspects of the question, to refer to the major problems to be dealt with.

36. The first was to determine how to establish State responsibility under international law: that was the first phase in a total process which culminated in the determination of appropriate remedies to redress the injury suffered as a result of the wrongful act. Determination of State responsibility was the most difficult aspect of

international law, since the rights and obligations of States were subject to a wide array of interpretations and, in different contexts, required different considerations and factors to be weighed. It was true, however, that the draft articles under consideration did not have to deal with that aspect as they would come into play after responsibility had been established.

37. Acts which constituted direct and serious attacks on international peace and security or friendly relations between States should naturally be distinguished from other acts and the Commission had drawn that distinction when it had defined international crimes and international delicts in article 19 of part 1 of the draft. The two categories of internationally wrongful acts should in fact be treated differently, if only because it was more difficult to establish the existence of a crime than that of a delict. In both cases, however, it might be years before it could be determined whether a wrongful act had occurred. Given that context, the draft articles under preparation would do well to deal with the legal consequences of a wrongful act and the remedies involved with a certain flexibility. Thus, in order to promote the draft articles and provide a solid foundation for the legal consequences of a wrongful act, account had to be taken of the practical difficulties involved in determining whether a wrongful act had occurred, as well as of the wide range of options available to States in finding common ground and defining responsibilities.

38. Secondly, he was somewhat disconcerted by the Special Rapporteur's categorization of the rules of international law. He found it difficult to understand both the need to categorize principles of international law into primary rules, secondary rules and general principles, and the relationship between those categories. A less theoretical and formalistic approach to the topic was desirable in order better to appreciate the basic principles involved.

39. With regard to the arguments put forward by the Special Rapporteur in support of a separate article on cessation and, in particular, the need to ensure that the international order was not jeopardized, he said that he shared the Special Rapporteur's concern, but felt that he had unduly emphasized that aspect of the issue. Cessation sometimes gave rise to other problems: for example, an act which was regarded as internationally wrongful at one particular time might not be so regarded at another time.

40. In order to speed up its work on the topic and complete the task entrusted to it, the Commission must build upon the work already done. The Special Rapporteur was definitely moving in that direction. It was, however, essential to avoid drafting the articles in such a way that they would give rise to problems of interpretation. He thought, for example, that the Special Rapporteur was placing too much emphasis on the "lasting or continuing character" of the internationally wrongful act.

41. As he had already stated, the Special Rapporteur was right to treat cessation separately from the other obligations arising out of a wrongful act. However, he could also have agreed with the method followed by the previous Special Rapporteur. He was nevertheless not sure whether the concept of cessation was a complete and appropriate one in every case: while cessation did take care of the negative consequences of a wrongful act, it might be less successful in meeting the need for positive action to be taken as a result of such an act. He also questioned whether it was appropriate to make cessation a pre-condition for any other remedy and even whether a distinction could always be made between cessation and the other remedies. Could that rule be made applicable in all cases? He would welcome clarification on all those points.

42. With regard to restitution in kind, of which there appeared to be two possible definitions, namely restitution as such and the re-establishment of the *status quo ante* combined with compensation, he found that, although such subtleties were interesting, they were not of overriding importance. Obviously, the situation that had existed prior to the wrongful act had to be re-established to the extent possible. In fact, however, it might be difficult to re-establish that situation fully and, since restitution *stricto sensu* could not be made, compensation always proved to be necessary. Having established the principle of restitution and the principle of its primacy, the Special Rapporteur made its application subject to certain conditions, and that had caused some confusion. Could some way not be found to formulate the new draft article 7 without stating an absolute principle to which exceptions would then be provided?

43. Referring to the limits which the Special Rapporteur proposed to set on restitution in kind, he said that he could accept material impossibility. Without clarifications and arguments supported by examples, however, it was difficult to accept other exceptions, such as "legal" impossibilities and, in particular, impossibility deriving from the requirement to refrain from violating an obligation arising out of a rule of general international law—unless it was really a rule of *jus cogens*, which was, in his view, the only "higher" rule—and impossibility deriving from the excessive onerousness of restitution for the author State. Similarly, other exceptions dealing with mitigating circumstances required careful and cautious treatment before they could be accepted: he had in mind those relating to domestic jurisdiction or internal law, or—in the name of the principle of the equality of States before the law—those relating to the political, economic or social system of the author State, although it might be possible to take account of its level of economic development. The fact was that a State which had committed an internationally wrongful act had an obligation of reparation, of which restitution in kind was one form, and it was pointless to affirm the primacy of the obligation of restitution in kind if exceptions to that principle were immediately provided for. What was necessary was to determine the conditions and forms under which restitution in kind was to be made.

44. Mr. KOROMA thanked the Special Rapporteur for the quality of his preliminary report (A/CN.4/416 and Add.1), from which the Sixth Committee of the General Assembly would certainly benefit.

45. Provisionally and for practical reasons, he was in favour of the Special Rapporteur's idea of dealing in two separate chapters of part 2 of the draft with the legal consequences of an internationally wrongful act, according to whether the act was a delict or a crime. The issue should, however, be given further consideration and, at a later stage, it would have to be determined whether the legal consequences of international delicts differed so much from those of international crimes that they should be dealt with separately. Such an approach would make it possible to determine the rights and obligations of the parties with regard

to the various forms of reparation and, if possible, with regard to the cessation of the internationally wrongful act, as well as the means by which the original violation was to be remedied.

46. There were, however, situations such as territorial or border disputes which entailed international responsibility but did not result either from an international delict or from an international crime. The Special Rapporteur should therefore expand his analysis to include situations in that grey area with a view to identifying the legal consequences that might derive from them.

47. The Special Rapporteur's proposal (*ibid.*, para. 4) to draw a distinction between the rights and obligations of the parties with regard to cessation and reparation and the various measures to be taken to secure cessation or reparation was logical at the current stage, because it would help to shed light on the sensitive problem of identifying the substantive and procedural legal consequences of internationally wrongful acts. That was an important point, because there were cases in which procedural issues could have a bearing on substantive issues: an example was that of the rule on the exhaustion of local remedies. The Commission would thus have a clear idea of the direction it was taking.

48. He had no settled views on the question whether part 3 of the draft should deal only with the peaceful settlement of disputes or include implementation (*mise en oeuvre*) as well: there was something to be said for both solutions.

49. By way of a general conclusion, he approved of the tentative outline proposed by the Special Rapporteur for parts 2 and 3 (*ibid.*, para. 20) and had no doubt that he would be sensitive to the urgency of his task and to the expectations of the international community.

50. Turning to the question of cessation of an internationally wrongful act and restitution in kind as forms of reparation for the violation of an international rule or obligation, he agreed with the Special Rapporteur that cessation was the obligation to discontinue the wrongful conduct in progress and to re-establish the normative action of the primary rule violated. He also agreed that cessation was not, strictly speaking, a form of reparation: it derived from the primary obligation incumbent upon every State to desist from an act by virtue of the very same rule which imposed upon it the original obligation that had been violated. It was because the obligation of the author State in the case of cessation was conceived as a primary rule that cessation must be included among the general principles in chapter I of part 2. The idea that the obligation of cessation referred only to a continuing breach was also valid. In other words, there were good reasons for regarding cessation as a separate form of reparation in the event of the breach of a primary obligation, but that did not mean that cessation could not be combined with other forms of reparation. In fact, there had been many cases of such combination, as the Special Rapporteur and other members of the Commission had indicated.

51. The new draft article 6 of part 2 would have to be reformulated either by the Special Rapporteur or by the Drafting Committee if it was to become a "peremptory rule"—that expression not being taken in its formal sense. The article could, for example, say that a State whose action or omission constituted a breach of international law or of an international obligation was, without prejudice to the responsibility it had already incurred, under an obligation to cease such action or omission forthwith. The Special Rapporteur had, in fact, already considered the possibility of such wording, but had abandoned it for the reasons explained in his report. In his own view, emphasis had to be placed on the fact that the obligation consisted of the immediate discontinuance of the violation or wrongful conduct and the restoration of the primary rule, rather than on the continuing nature of the wrongful act. In other words, the purpose of cessation was to put an immediate end to the wrongful act, whether or not it was of a continuing nature. The text proposed by the Special Rapporteur did not, however, bring out that idea of urgency clearly enough, whereas the formulation he himself had suggested had the advantage of providing for the immediate cessation of the wrongful conduct and hence the restoration of the primary rule, while leaving the door open to the possibility of implementing the secondary obligation arising out of the violation.

52. With regard to the new draft article 7, he said that there was a marked difference between restitution in internal law and restitution in international law. In internal law, for example under the common law, a claim for restitution was not, strictly speaking, a claim for damages: its purpose was not to compensate for a loss, but to deprive the party that was in breach of a benefit, in other words to place both parties in the position in which they would have been if the contract had not been made. In international law, the prime consideration of *restitutio in integrum* was the restoration of the *status quo ante*. It could also be said that, in internal law, under the common law at least, the effect of restitution was the non-existence of the contractual relationship, whereas international law, as shown by the judgment of the PCIJ in the *Chorzów Factory* case,[5] attempted to wipe out all the consequences of the wrongful act and to re-establish the situation which would have existed if the breach had not been committed. In that connection, he said that he did not agree with the comment by F. A. Mann quoted by the Special Rapporteur (*ibid.*, footnote 70): restitution in kind was not "largely unknown to the common law"; it merely served a different purpose.

53. He noted that the Special Rapporteur had opted for the international law approach to the function of restitution, but had qualified it: the State which was in breach could not be asked to make restitution which was materially impossible or which related to an irreversible situation; it could not be asked to make restitution when such restitution would involve a breach of a rule of *jus cogens*; and restitution must not constitute an excessively onerous burden for the wrongdoing State or go against its will. All those conditions would appear to apply more particularly to cases in which the act in question related to a concession or a nationalization and in which the injured party was not entitled—saving exceptions—to claim restitution: the sole remedy then lay in damages. The Special Rapporteur was right to adopt that position, because restitution as a form of reparation tended to be invoked chiefly in cases in which it was physically or politically possible: according to State practice, and even considering the judgment in the *Chorzów Factory* case, restitution, notwithstanding the other examples cited by the Special Rapporteur (*ibid.*, footnote 120), was

[5] Judgment No. 13 of 13 September 1928 (Merits), *P.C.I.J., Series A*, No. 17.

normally considered as merely a preliminary to the assessment of monetary compensation. Hence, in his view, the Special Rapporteur had, on the whole, struck the right balance in draft article 7.

54. Finally, in a document such as the report under consideration, in which the notes were sometimes richer in information than the text itself, they should be placed at the bottom of the pages to which they related rather than at the end of the document.

55. Mr. ARANGIO-RUIZ (Special Rapporteur) thanked members for their comments. It would be preferable if he summed up the discussion and replied to the questions that had been raised within the framework of his forthcoming second report, which would deal, in particular, with the other forms of reparation, their modalities and their relationship with cessation and *restitutio in integrum*. It was a fact that judges did not always draw a distinction between cessation and restitution, restitution and compensation, compensation and satisfaction, and satisfaction and guarantees of non-repetition. Obviously, all those remedies telescoped at some point or another and, in his second report, he would analyse the judicial decisions which illustrated that state of affairs.

56. In reply to a question by Mr. AL-KHASAWNEH and Mr. DÍAZ GONZÁLEZ, the CHAIRMAN said that, time permitting, the members of the Commission who had not yet done so would be able to speak on the topic before the end of the present session.

The meeting rose at 1.15 p.m.

2106th MEETING

Tuesday, 23 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

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

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*)* (A/CN.4/411,[2] (A/CN.4/419 and Add.1,[3] A/CN.4/L.431, sect. D, ILC(XLI)/Conf. Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 13 (War crimes)[4] (*continued*)

1. The CHAIRMAN said that the Special Rapporteur had now prepared an indicative list of war crimes for inclusion in draft article 13. Most of the members of the Commission who had spoken on the topic had expressed a preference for the second alternative of the article, and it had been suggested that the addition of a list of crimes would provide useful guidance for the Drafting Committee.

2. He invited the Special Rapporteur to introduce paragraph (*c*) of the second alternative of article 13 (A/CN.4/419/Add.1), which read:

> **(*c*) The following acts, in particular, constitute war crimes:**
>
> **(i) serious attacks on persons and property, including intentional homicide, torture, the taking of hostages, the deportation or transfer of civilian populations from an occupied territory, inhuman treatment, including biological experiments, the intentional infliction of great suffering or of serious harm to physical integrity or health, and the destruction or appropriation of property not justified by military necessity and effected on a large scale in an unlawful or arbitrary manner;**
>
> **(ii) the unlawful use of weapons and methods of combat, and particularly of weapons which by their nature strike indiscriminately at military and non-military targets, of weapons with uncontrollable effects and of weapons of mass destruction.**

3. Mr. THIAM (Special Rapporteur) said that, in preparing the list of war crimes in paragraph (*c*), he had been faced with several options. He could have reproduced in its entirety article 85 of Additional Protocol I[5] to the 1949 Geneva Conventions; that article contained a list of all "grave breaches" and could have provided the substance for a first subparagraph, listing acts against protected persons and property. A second subparagraph would then have dealt with the unlawful use of weapons. However, he had been reluctant to use article 85 as a whole, because of the reservations expressed by certain States. Moreover, some States had not accepted Additional Protocols I and II. The proposed list was therefore based on a number of sources, including Additional Protocol I, Law No. 10 of the Allied Control Council,[6] the Charter of the Nürnberg Tribunal,[7] the 1954 draft code and suggestions made by members of the Commission. The list was purely indicative, and was intended as a working document. Crimes could, of course, be added or deleted.

4. Paragraph (*c*) (i) listed attacks on persons and property afforded protection under the laws of war, even if they were not mentioned in article 85 of Additional Protocol I. The qualifier "protected" might be added before the words "persons and property", and a reference could well be made to the improper use of protective emblems.

5. Paragraph (*c*) (ii) dealt with the unlawful use of weapons and methods of combat, a time-honoured notion

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* Resumed from the 2102nd meeting.

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] For the text, see 2096th meeting, para. 2.

[5] See 2096th meeting, footnote 11.

[6] *Ibid.*, footnote 9.

[7] *Ibid.*, footnote 7.

found in the Geneva and Hague Conventions. He had not attempted to include specific types of weapons because of the difficulty of definition. It would be for the Commission to decide whether particular categories of weapons should be expressly prohibited.

6. Mr. BARBOZA observed that the list proposed by the Special Rapporteur was basically the same as that submitted in his fourth report in 1986 (art. 13, second alternative).[8] It would follow on from paragraphs (*a*) and (*b*) of the present second alternative, and be introduced by the clause: "The following acts, in particular, constitute war crimes". In other words, the text of paragraph (*a*) would not be changed, but the square brackets would be removed from the word "serious" qualifying the word "violation". The article would thus have a general part and then give specific examples in a non-exhaustive list. Other breaches not included in the list would consequently be covered by the code, provided they were "serious". And the seriousness of such breaches—in order for them to merit inclusion in the code—would be a matter for appraisal by judges.

7. In discussing the two alternatives of draft article 13 in his seventh report (A/CN.4/419 and Add.1), the Special Rapporteur drew a distinction between "breaches" and "violations". The crimes themselves were "breaches", the term "violations" being used to denote the difference between the conduct required by the legal rule and the conduct which had actually taken place. The concept of "gravity" would vary according to whether it applied to "breaches" or to "violations": a breach like homicide was more serious than a breach like theft, because it was more important to protect human life than property. Within one and the same breach, some violations were more serious than others, depending on how far the actual conduct was removed from that required by the legal rule: for example, homicide compared with homicide with aggravating circumstances, or theft of a large sum of money compared with theft of a small sum. By referring to "gravity", the intention was that the code would cover only those acts which were serious enough to undermine the peace and security of mankind, since the latter were the object of its protection. Clearly, appraising the gravity of violations was essentially a judicial function, whereas appraising the gravity of breaches was a legislative function. It would therefore be best to refer, in article 13, not to "violations", but to "breaches". Paragraph (*a*) would then be redrafted along the following lines: " . . . the following breaches of the rules of international law applicable in armed conflict constitute war crimes". It would be followed by the existing paragraph (*b*), and by the list of crimes. The list should not be indicative, and the words "in particular" should therefore be omitted.

8. It had been argued that a general definition, followed by specific examples, would suffice. That had been the formula used in defining aggression. However, in that case, if a particular act was not listed, it was easy to determine whether it fell within the scope of the general definition of aggression. By contrast, the proposed list of war crimes was not preceded by any general definition, but merely by a reference to other international instruments and to custom, which provided no such general definition and established only that certain conduct constituted specific war crimes. A reference to specific crimes was no substitute for a general definition. A court which had to determine whether a particular form of conduct not included in the list was a war crime would have to decide on the basis of analogy with crimes of similar gravity, and that was not a permissible approach in a liberal system of criminal law. It had been said that the code must be flexible in order to cover all the breaches that might arise in the future. National penal codes, however, did not define every conceivable offence, nor did they claim to cover future offences by reasoning on the basis of analogy with existing ones, which was forbidden in criminal law. As for the desired flexibility, it was impossible to have the advantages of a code without its disadvantages.

9. He wondered why an exhaustive list should be an insuperable problem. There was very little likelihood, after all, that any existing grave breaches would be excluded, and future ones would be largely covered by custom (as was now the case) until such time as it was agreed to include them in the code. The proposed list had one drawback not found in the 1949 Geneva Conventions: it did not specify which categories of persons were protected. The result might be confusing, since war was inevitably directed against persons and property, perceived as military targets. Serious attacks on persons and property and intentional homicide could not be prohibited unless war itself was done away with. A list of war crimes had been proposed by Mr. Malek at the thirty-eight session, in 1986;[9] that list took account of protected persons and could perhaps be used as a basis for the new one.

10. Mr. SHI said he fully recognized that compiling an exhaustive list of war crimes would be a formidably difficult, if not an impossible, task. The list proposed by the Special Rapporteur in paragraph (*c*) was an indicative or illustrative one, and was essentially a slightly modified version of the list submitted in his fourth report in 1986.

11. In his opinion, the crimes should be set out in separate subparagraphs, in the interests of consistency with the drafting style used for other categories of crimes. Secondly, he doubted whether the taking of hostages in combat should be included as a war crime. Article 6 (*b*) of the Charter of the Nürnberg Tribunal defined the killing of hostages as a war crime, but not the taking of hostages. Thirdly, the concept of "deportation or transfer of civilian populations from an occupied territory" was too vague. In article 6 of the Nürnberg Charter, the purpose of deportation was an important element of the crime. The transfer of civilian populations to ensure their safety during hostilities could not be made a war crime. What was forbidden in the Nürnberg Charter was deportation for the purpose of slave labour or the like. Again, the words "destruction or appropriation of property" should be replaced by the words used in article 6 of the Nürnberg Charter, namely "wanton destruction . . . " and "plunder of public or private property". Such a formulation would make it clear that it was the gravity of the destruction that made it a war crime under the present code.

12. Paragraph (*c*) (ii) could be deleted. The unlawful use of weapons was a difficult question for codification.

[8] *Ibid.*, footnote 4.

[9] *Yearbook . . . 1986*, vol. I, p. 95, 1958th meeting, para. 6.

Moreover, it was already partly covered in international conventions and would be further developed by disarmament conferences.

13. In his view, the proposed list of crimes could be referred to the Drafting Committee.

14. Mr. OGISO said that the Special Rapporteur had originally been hesitant about including a list of crimes and he himself had shared that view. He still believed that an indicative list was bound to create problems. For instance, paragraph (*c*) (ii) referred to the "unlawful use of weapons and methods of combat", which raised the question of what constituted "unlawful use". Moreover, the reference to weapons and methods of combat raised the issue of weapons of mass destruction. Clearly, the list would pose more difficulties than it sought to resolve.

15. If a list was to be attached to the definition of war crimes in draft article 13, however, a few points called for brief comments. First, paragraph (*c*) (i) made no mention of attacks against a civilian population, which were covered by article 85, paragraph 3 (*a*), of Additional Protocol I to the 1949 Geneva Conventions. Paragraph (*c*) (i) referred indirectly to the matter, but it was essential to lay down in direct terms a prohibition on attacks against civilian populations.

16. The same problem arose in paragraph (*c*) (ii) with regard to the unlawful use of weapons of mass destruction. The paragraph spoke of weapons "which by their nature strike indiscriminately at military and non-military targets"; yet a weapon used against a military target could also harm the civilian population. Weapons used to attack and destroy whole cities should be expressly prohibited.

17. He was also struck by the absence of any reference whatsoever to the ill-treatment, or inhuman treatment, of prisoners of war. It was essential to introduce a reference to that offence in either paragraph (*c*) (i) or paragraph (*c*) (ii), or possibly in a separate subparagraph altogether. Inhuman treatment of prisoners of war, including the use of prisoners of war for forced labour, both during and after hostilities, should certainly be characterized as a war crime.

18. It was questionable whether the list of crimes would be of assistance in making progress on the present topic. Mr. Shi had suggested that paragraph (*c*) (ii) should be deleted; but the provisions it contained covered an important component of war crimes and reflected the progress made on the matter since the end of the Second World War. The subparagraph should be retained, but he would none the less urge caution with regard to the inclusion of a detailed list of war crimes.

19. Mr. CALERO RODRIGUES expressed appreciation to the Special Rapporteur for presenting a list of war crimes in response to the wishes of some members, for it would be useful not only to them, but also to members like himself who did not approve of the idea of including a list in draft article 13. All members were agreed, however, that it was practically impossible to draw up an exhaustive list, largely because of the many instruments that were applicable. For example, the four Geneva Conventions of 1949 and the two Additional Protocols thereto dealt with grave breaches which constituted war crimes. The prohibition of certain weapons resulted from a large number of international agreements dating back in some cases more than a century. Further crimes would certainly be added as a result of international legislation in the process of formulation.

20. Hence there was an additional disadvantage to a list of war crimes: it would have the effect of freezing the concept of war crimes at a particular point in time and the list would have to be amended every time a new act was made unlawful. Mr. Boutros-Ghali (2096th meeting) had suggested that the inclusion of a list would be a valuable means of mobilizing world public opinion. The important point, however, was that an illustrative list was of no great value for legal purposes, which were the purposes the Commission should primarily have in mind. Public relations were a secondary matter.

21. The two alternatives of draft article 13 submitted by the Special Rapporteur differed only in terminology: the second used the expression "armed conflict" instead of the term "war". As to substance, the two provisions were identical. The adjective "serious" was acceptable because it corresponded to the distinction drawn in the Geneva Conventions between common breaches and "grave breaches". Mr. Barboza, in his remarkable statement, had drawn a useful distinction between serious violations and grave breaches.

22. The best course would be for the Commission to draw on the terms of article 147 of the Fourth Geneva Convention, an important provision which he had cited at the 2099th meeting (para. 48) and which would be of assistance to the Commission in solving the problem it now faced. The Geneva Conventions made the important distinction between grave breaches and other breaches. On that basis, article 147 of the Fourth Convention, and the corresponding articles of the other Conventions, specified that "Grave breaches . . . shall be those involving any of the following acts . . . ". There followed an exhaustive list of the acts in question.

23. The exhaustive list of acts in article 147 was not a list of war crimes as such, but of acts which, if involved in a particular course of conduct, made that conduct a "grave breach". It would be noted that article 147 made frequent use of the words "wilful" and "unlawful". In the case of wilful killing, the emphasis was on the killing of a protected person, whether a prisoner or a civilian, as a violation of the laws or customs of war. Clearly, the broad expression "wilful killing" did not meet the case unless qualified by the words "if committed against persons or property protected by the present Convention".

24. He was not opposed either to retaining or to deleting paragraph (*c*) (ii) of the list proposed by the Special Rapporteur, but would point out that it referred to the "unlawful use" of certain weapons and methods of combat. The provision thus dealt with acts which were forbidden by existing international law. It did not deal with the problem of first use of such weapons.

25. As rightly pointed out by Mr. Barboza, draft article 13 did not contain a real definition of war crimes; it gave only an indication. Of course, only serious violations would constitute war crimes.

26. His own suggestion would be for an article 13 along the following lines: first, a paragraph (*a*) as in the second alternative proposed by the Special Rapporteur; secondly, if desired, a paragraph along the lines of paragraph (*b*) of

the second alternative, even though that provision was not essential, since it merely expressed a self-evident fact. Those paragraphs would be followed by a new paragraph (*c*), reading: "For the purposes of paragraph (*a*) above, serious violations shall be those involving any of the following acts . . . ", followed by the list of acts from article 147 of the Fourth Geneva Convention. Such a method would combine the approach suggested by Mr. Barboza with the system used in the Geneva Conventions.

27. It was clear that the Commission would find it difficult to agree even on an indicative list. Problems of terminology would also arise. For example, the list now under consideration used the term "intentional homicide", which was obviously a translation of the original French *homicide intentionnel*. Yet the term used in the official English text of the Geneva Conventions was "wilful killing". Difficulties were bound to arise from that kind of discrepancy.

28. Mr. FRANCIS said that he had been impressed by Mr. Barboza's statement, which had proved the obvious need for a list, if only because the code could not otherwise be effectively implemented by national courts. An illustrative list of war crimes would not be necessary if the code was to be applied by an international tribunal. National courts, for their part, would need guidance because of their lack of familiarity with international law. He also strongly supported Mr. Barboza's plea for a definition.

29. He wished to propose that drug trafficking should be classified as a crime against humanity, the subject-matter of draft article 14. The question had been raised as early as 1985 by Mr. Reuter, who was a leading authority on the international instruments on the control of narcotic drugs and the struggle against the drug traffic.

30. The CHAIRMAN suggested that that proposal should be made at the end of the present discussion.

31. Mr. BARSEGOV said that it was clearly not at all easy to draw up a precise list of war crimes, but it was absolutely necessary to do so. The task therefore had to be undertaken. The Special Rapporteur had made an excellent contribution to that task by submitting paragraph (*c*) of draft article 13, which provided a good basis for the Commission's consideration of the issues involved. On those issues, there were bound to be different views, as the discussion had shown.

32. With regard to the purpose of the list, some statements made during the discussion had been interpreted to mean that the list would be of value only as a way of impressing public opinion and that it was devoid of legal significance. He did not share that view. The Commission was concerned with the preventive function of the law, which was a primordial task of law and justice.

33. The list proposed by the Special Rapporteur could no doubt be improved. The Drafting Committee would make changes and additions to it, in the light of the discussion in the Commission. In that constructive spirit, he wished to offer some comments.

34. In his earlier statements, he had expressed himself in favour of a precise definition with as comprehensive a list as possible of acts constituting war crimes under the code. As he saw it, that approach was a prerequisite for the success and effectiveness of the code. Many members probably agreed with him on that point. The difficulties inherent in the topic, to which the Special Rapporteur had referred, were connected with the complex political problems involved. That being so, the question arose of the course to be adopted by the Commission. It could, of course, ignore the problems in question and abandon the idea of drawing up a list, or formulate a list which reflected the conditions prevailing at the end of the nineteenth century and the beginning of the twentieth century, when the major concern had been to prevent the use of such weapons as explosive bullets, which inflicted unnecessary suffering, and other similar issues. But the world today was faced with altogether different problems. New methods of warfare had been evolved and weapons of mass destruction had been introduced. In particular, the use of nuclear weapons was considered by many jurists not only as a war crime, but also as a means of genocide. With the weapons of mass destruction now available, it was possible to wipe out the whole of mankind. The terms "technological genocide" and "omnicide" had appeared in specialized legal literature. And with the aid of technology, it was possible to commit those crimes "in white gloves".

35. The inclusion of the use of nuclear weapons in the list of crimes had been on the agenda for many years. The difficulty, however, was to decide whether first use alone should be treated as a crime, response being regarded as part of legitimate self-defence, or whether any use of nuclear weapons should be prohibited. The arguments for and against those propositions were familiar to members, and the upshot was that the Commission had not settled the question. The Special Rapporteur had suggested that the word "first" could be placed between square brackets, thus leaving the matter open, but that, according to the Special Rapporteur, would prolong the debate indefinitely and prevent the adoption of the code. The Special Rapporteur had therefore now suggested a broader formula covering all weapons of mass destruction which struck indiscriminately at military and non-military targets. It was a diplomatic approach, and one to which it was difficult to raise objections, for it would break the deadlock and allow progress to be made. Its drawback was that it lacked specificity and disputes might arise as to what constituted the "unlawful use" of such weapons. Many would agree that the use of a weapon as a response was not unlawful. The question again, however, was whether first use was lawful, which was to revert to the initial question.

36. What counted most was not any possible *post facto* distinctions, for example after a nuclear weapon had been used; what mattered was the fact that failure to characterize the use of such weapons as wrongful under the code weakened the preventive function of the code. Although the Special Rapporteur would no doubt have liked to have some more specific form of wording which would serve to prevent such crimes, he had been guided by considerations of realism, having in mind the results of many years of debate on the issue.

37. Times had changed, however, and new thinking was increasingly permeating areas of international relations in which there had seemed to be no prospect of improvement. Formerly, when approaching such matters, States—and, in their turn, scholars and legal experts—had acted on a basis of suspicion and mistrust; but such suspicion and mistrust were now increasingly being replaced by confidence and trust. Nowadays no sensible person could regard the use of

nuclear weapons as reasonable. It was necessary to approach the question from that standpoint and to take the broader view.

38. Should some members feel that the "first use" formula was an obstacle to outlawing the use of nuclear weapons and making it a punishable offence under the code, then—in the spirit of growing trust—he would suggest that the use of nuclear weapons be included in the list of war crimes without confining it to the first-use concept. In that way, the Commission would be taking a practical step in the interests of mankind and of strengthening peace and security. He fully appreciated that matters of political significance, which could not be finally resolved by the Commission, were involved, and that regard must be had to the results of the talks on disarmament. In his view, however, in that sphere, as in other areas of the Commission's work, members could come forward with initiatives provided that such initiatives were designed to strengthen the law, the legal order, and peace.

39. In addition to those points, he wished to raise some other issues concerning the applicability of restrictive or prohibitive norms to anti-colonial and national liberation movements. The humanization of the law of war should not only apply to wars between States. It seemed impossible to him to restrict the application of the code to occupied territories, excluding any reference, for example, to the criminal nature of the inhuman treatment of civilians, their deportation, and the destruction of their property in territories populated by peoples living under colonial domination or subject to other forms of foreign domination.

40. He agreed that the text proposed by the Special Rapporteur should be referred to the Drafting Committee, together with the comments made during the debate.

41. Mr. McCAFFREY said he agreed that the question at issue had to be answered in the light of the method to be adopted for enforcing the code. If it was envisaged that the code would be enforced by an international criminal tribunal, a general definition would raise no difficulty, for such a tribunal would have the necessary expertise to apply the definition and its decisions would be consistent. It was unlikely, however, that the decisions of national tribunals, which might be unfamiliar with international law and particularly with the laws and customs of war, would achieve that consistency whereby a body of law could be developed to provide for the uniform interpretation and application of the code.

42. It had been said that the code would be applied and interpreted more frequently by national tribunals than by an international criminal court. If so, it was a frightening prospect, for the reasons he had stated in the past. Without a particular tribunal to which the States parties could assign the authority to make decisions regarding any violations of the terms of the code, it would not be possible to be sure how its provisions, including those on war crimes, would be interpreted and applied.

43. In his view, to try to draft a list of war crimes would be to open Pandora's box. A very specialized area was involved, one that called for the mobilization of expertise as to current practices in the conduct of hostilities. In endeavouring to draw up an indicative list, the Commission would face two problems, the first being the extent to which such a list departed from the 1949 Geneva Conventions, which were among the most universally adopted of all international instruments. To depart from them might cast doubt on the continued validity of the Conventions, and it was most unlikely that the Commission intended to do that. The other problem was that, should the Commission decide to establish a list which did not merely contain a reference to those Conventions, but charted a path of its own, considerable time and resources would be required to update the Conventions so as to take account of the modern techniques of warfare.

44. Like Mr. Ogiso and other members, therefore, he would be very reluctant about trying to draw up a list. Admittedly, his position was somewhat ambivalent, since he also felt that it might create a dangerous situation if there were no list and if enforcement were left to national tribunals. But if there was to be a list, it certainly could not be exhaustive: the Commission lacked the resources and, even if it did have them, the list would probably be out of date by the time the code came into force.

45. The proposed text of paragraph (*c*) illustrated the difficulties of trying to compile a list of war crimes. It had been suggested, for instance, that the word "protected" should be inserted before "persons". If that meant protected by the rules of international law applicable in armed conflict, then it was probably necessary to say so specifically. Alternatively, the terms "protected person" and "property" should be defined. As also rightly pointed out, the expression "intentional homicide" had undergone some changes in its various translations. The phrase "deportation or transfer of civilian populations from an occupied territory" would also require close examination, bearing in mind that that particular crime was limited in various ways under the Geneva Conventions, and that some reference should be made to the purpose of the deportation. Again, the expression "inhuman treatment" could be interpreted in a number of ways. Lastly, the expression "appropriation of property" raised many questions as to its precise meaning, and he would have thought that the Commission would have been more concerned with the destruction than with the appropriation of property.

46. Another difficulty stemmed from the fact that the list went a step further than the Geneva Conventions. Indeed, the code itself was not restating the terms of the Conventions but was endeavouring to identify violations of them that would threaten and endanger the peace and security of mankind. He would not touch on the question of the first use of nuclear weapons; that was an intrinsically political issue and no useful purpose would therefore be served in addressing it. The suggestion that the Commission should seek to identify grave or serious breaches in the context of the Geneva Conventions bore scrutiny, however, and should perhaps be considered further.

47. For all those reasons, he would be very hesitant about referring the proposed list to the Drafting Committee. He favoured a more general definition, in which connection it might well be possible to draw on article 19 of part 1 of the draft articles on State responsibility.[10] Such a definition could perhaps be linked to the Geneva Conventions, to provide some guidance for national courts which had to apply the code. He would tentatively suggest, for further

[10] See 2096th meeting, footnote 19.

consideration, some wording such as: "War crimes within the meaning of this Code are serious breaches on a widespread scale of the laws and customs of war", possibly followed by a definition, along the lines suggested by Mr. Calero Rodrigues (para. 26 above), of what constituted a grave breach.

48. Mr. KOROMA thanked the Special Rapporteur for his prompt response to the Commission's request for a list, albeit indicative, of war crimes. The complexity of the exercise was commensurate with its importance, which was no less than that of the draft code as a whole. He agreed with Mr. McCaffrey that both time and expertise would be needed to carry it out successfully, particularly in the light of developments in modern weapons technology.

49. In comparison with the list of crimes set out in the Nürnberg Principles,[11] for example, the list before the Commission was indeed brief. Given the rigorous approach expected of the Commission, no effort should be spared to seek out the widest variety of pertinent sources, in addition, of course, to the 1949 Geneva Conventions, in order to present an authoritative, if non-exhaustive, list to the international community.

50. It should not be forgotten that the war crimes concerned could be committed both by soldiers in the field and by civilians and that, in its work on the draft code, the Commission had decided to confine its attention to the criminal responsibility of the individual and to exclude the question of the criminal responsibility of States. From the point of view of drafting, it might be preferable to replace the words "in particular" in the introductory clause of paragraph (*c*) by "*inter alia*", since the present wording was likely to give the impression that the crimes listed were the most serious types of war crimes, which was not the intention of the draft.

51. The question of seriousness or gravity, although discussed at length, remained of crucial importance when it was borne in mind that it would be possible for a national or international court to initiate criminal proceedings in the case of war crimes. To introduce the criterion of gravity might be to introduce an element of subjectivity: for example, a State would be in a position to decide for itself whether a given crime was sufficiently serious to warrant prosecution. He continued to believe that any individual, whether military or civilian, who committed an act violating the rules of international law governing armed conflict should be liable to punishment as a war criminal: such an assumption precluded the criterion of seriousness. Mr. Barboza had said that the concept of gravity referred not to the act itself, but to the deviation from the rule of international law. However, he personally believed that the act itself constituted the deviation that violated international law, and he therefore found the distinction between the act and the deviation unduly subtle. After all, in criminal law for example, theft was still theft whatever the scale on which the offence was committed, and the offender was held liable accordingly. The most satisfactory approach might be, as Mr. Calero Rodrigues had suggested (para. 26 above), to have a general definition and to specify the acts considered as war crimes under the code. The definition itself, however, should not state that a violation must be "serious" in order to constitute a war crime.

52. Paragraph (*c*) (i) referred to "intentional homicide", a somewhat infelicitous expression which should be replaced by "wilful killing". That, however, need not be discussed at length, since it was a matter of drafting, as was the useful suggestion already made that each act should be made the subject of a separate subparagraph.

53. He was reluctant to address the question of the first use of nuclear weapons, which was highly controversial. Although there was a substantial body of opinion in the international community which held that the first use of nuclear weapons would constitute the most serious of crimes, the Commission was not the most appropriate forum in which to discuss such issues. However, as he saw it, paragraph (*c*) (ii) generally covered the use of weapons prohibited under various relevant international instruments. It should be understood to refer, *inter alia*, to prohibited projectiles such as those containing asphyxiating gas, to bacteriological weapons and to the bombardment of undefended towns and villages.

54. Lastly, he wondered whether the Commission might not wish to extend the scope of paragraph (*c*) (i) to include experiments which were not strictly of a biological nature. To do so, however, it would have to draw on some technical expertise from outside.

55. Mr. BEESLEY expressed his appreciation to the Special Rapporteur for taking into account views he did not himself necessarily share. The Commission should adopt a similar approach in dealing with a topic which was of the highest importance, and particularly in referring texts to the Drafting Committee.

56. It might be best when submitting texts for consideration by the Sixth Committee of the General Assembly or for scrutiny by the international community of States to offer an element of choice, since there was an ever-present danger of straying from the legislative function into the quasi-judicial function. In earlier exercises in the progressive development and codification of international law, such as those which had led to the 1974 Definition of Aggression[12] or the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[13] it had been clear which was the United Nations organ where the legislative function lay and which was the United Nations organ where the quasi-judicial or judicial function lay. That was not the case with the draft code, and the Commission must constantly keep in mind the question of what tribunal would be implementing or applying the code.

57. Although it could be argued that it was highly dangerous to leave it to national tribunals to apply a non-exhaustive list of crimes, it was equally hazardous to present national tribunals with too general or generic a definition of war crimes. The complexity and range of issues involved—such as *mens rea*, presumption of innocence, and extradition—were such that the Commission's work could be emasculated unless some guidance were received from the international community. It ought not to be for the Commission to decide how the code would be implemented.

[11] *Ibid.*, footnote 14.

[12] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[13] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

58. At the same time, progress had been made towards consensus on the scope of the draft code. It had been agreed that it dealt with the relations between States and individuals and not between States themselves, and that the purpose of the exercise, as Mr. Barsegov had stated, was primarily preventive.

59. On the question of seriousness or gravity, he was of the opinion that the very inclusion of a crime in the draft code itself implied that it was sufficiently serious to warrant prosecution. The whole issue, however, was more judicial than legislative in character. In that connection, he agreed with the points made by Mr. Barboza and Mr. Calero Rodrigues, particularly with regard to the importance of the 1949 Geneva Conventions in general, and of article 147 of the Fourth Convention in particular, in pointing the way to a solution of the problems raised by the criterion of gravity.

60. The difficulties inherent in an indicative list of crimes were apparent from the list in paragraph (*c*) proposed by the Special Rapporteur, but the only important issue was whether some especially serious crime had been omitted. The use of chemical weapons could have been specifically mentioned, but there seemed little point in protracted discussions once the basic principle of a non-exhaustive list had been agreed upon.

61. The Commission was making progress in its work, despite the difficulties it faced and the need for special expertise. It might be premature for the proposed texts to be referred to the Drafting Committee if they were to include a list, but he had no objection to such a course and hoped that there would be time to evaluate the results before the Commission's proposals were presented for consideration by the Sixth Committee.

62. Mr. YANKOV said that he wished to join in the expressions of gratitude to the Special Rapporteur for the list submitted in paragraph (*c*). As he understood it, the task now before the Commission was to decide whether the format of a list combined with a general definition was feasible, and if so, to determine how the general and specific elements were to be combined.

63. The definition should contain more constituent elements. Individual serious violations should be regarded not as examples of criminal acts, but as essential components of the legal notion of a war crime as a violation of the rules of international law applicable in armed conflicts. That approach might seem unrealistic, but in his view it was sound, both because of the analogy with municipal criminal law and because any tribunal must be able to refer to basic rules incorporating not merely an indicative list, but also a legal definition of a war crime embodied in the code itself. In arriving at that definition, the source material provided by the Nürnberg Principles[14] and the 1949 Geneva Conventions had not been superseded, and would repay careful study.

64. It might be appropriate to incorporate a safeguard clause to the effect that any other serious violations of the rules of international law applicable in armed conflict were covered by the definition, but the definition itself should contain all the essential elements relating to the legal notion of a war crime.

65. The list proposed by the Special Rapporteur provided a useful basis for discussion, but it needed further scrutiny and elaboration. In particular, the treatment of protected persons should specifically include both combatants and non-combatants. Similarly, deportation and the destruction of undefended towns and villages, as covered by the Charter of the Nürnberg Tribunal, should be included, as should a reference to proscribed weapons and methods of warfare. With regard to the matter of weapons of mass destruction, there seemed to be differences of opinion, but his own view was that the modern legal and moral concept of weapons of mass destruction should be explicitly reflected in the text by a reference to "nuclear and other weapons of mass destruction". The issue did have political implications, but he believed that the specific inclusion of nuclear weapons was important from the point of view of realism and prevention.

66. Lastly, the text proposed by the Special Rapporteur, together with the suggestions made during the debate, should be referred to the Drafting Committee for consideration.

The meeting rose at 1.05 p.m.

2107th MEETING

Wednesday, 24 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/411,[2] A/CN.4/419 and Add.1,[3] A/CN.4/L.431, sect. D, ILC(XLI) Conf.Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLE 13 (War crimes)[4] (*concluded*)

1. Mr. Sreenivasa RAO said that, since he had been unable to take part in the general debate, he would make

[14] See 2096th meeting, footnote 14.

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] For the text, see 2096th meeting, para. 2, and 2106th meeting, para. 2.

some comments on the question of war crimes before referring to the list of crimes proposed by the Special Rapporteur in paragraph (*c*).

2. First, the Commission could treat the expression "war crimes" as a term of art and explain in the commentary that the expression could be understood to refer to any armed conflict, whether or not it was considered as a "war" in the traditional sense. It should also be noted, as Mr. Solari Tudela (2100th meeting) had pointed out, that war as an instrument of national policy and as a legal institution was prohibited by customary law and under Article 2, paragraph 4, of the Charter of the United Nations.

3. Secondly, the code should deal only with "serious" crimes, as the Commission had already decided, but it might also apply, as some members had suggested, to crimes which could be regarded as serious by virtue of their implications for the peace and security of mankind, even if the criminal act itself did not entail immediate serious consequences.

4. Thirdly, the code should contain a list of war crimes, which would be drawn up on the basis of the instruments applicable to the law of international armed conflicts, such as the 1949 Geneva Conventions and their 1977 Additional Protocols, bearing in mind, however, the views and interests of the majority of States in order to ensure that the list was as universally acceptable as possible.

5. Fourthly, a list of that kind would be essential if the code was to achieve its objective of deterrence—even if it was difficult to draw up, even if it must be flexible enough to be subsequently expanded to include certain acts which the international community would come to regard as wrongful, and even if it was admitted that the list could never be complete and exhaustive. For that reason, he would accept a general definition of war crimes, to be followed by a list introduced by the words "*inter alia*", rather than "in particular", in order to avoid any idea of priority. In that connection, it should be noted that the second alternative of draft article 13 could not be followed by a list of crimes, since it provided no definition: it merely referred to various international instruments and did no more than state the obvious. Thus, if the code was to be of any value as a legal instrument, it had to be as self-contained as possible.

6. Turning to the proposed list of war crimes in paragraph (*c*), he said he, too, considered that the expression "intentional homicide" should be replaced by "wilful killing" and that it would be useful to draw upon the acts listed in article 147 of the Fourth Geneva Convention[5] in characterizing "grave breaches", even if the Special Rapporteur preferred to use the expression "serious violation". The list contained in paragraph (*c*) (i) should also be carefully analysed in the light of various relevant international instruments in order to update those texts and reflect the international consensus as closely as possible. That was a task that could be entrusted to the Drafting Committee. Similarly, the doctrine of military necessity should be given close scrutiny by the Commission, not only where it related to the appropriation of property, but also where it was used as a justification for destroying property or for other acts which might otherwise be regarded as "crimes" involving excessive injury and harm and unnecessary suffering. The concept should be reviewed in the light of recent trends in humanitarian attitudes and of the content of the code itself. The same was true of the concept of "suffering", firstly because some means and methods of combat could cause not only immediate, excessive and unnecessary "suffering" to the combatants, but also long-term damage to the environment and natural resources, and also because such "suffering" might extend over a period of time or appear only after a certain period of time. Those were elements which might serve as criteria for determining whether an act causing great suffering did or did not constitute a war crime.

7. While it was true that the Commission did not have to reinvent international humanitarian law and that it should confine itself primarily to codification, it should at the same time not hesitate to engage in a creative analysis of current trends and of the aspirations of the international community. After all, it was also the Commission's mandate to promote the progressive development of international law, and it would be failing in its duty if it did not carry out the necessary re-examination of the concepts of "military necessity" and "suffering".

8. With regard to paragraph (*c*) (ii), his first reaction was, as other members had suggested, that it should be kept as a separate provision and not be incorporated in paragraph (*c*) (i). The crimes listed in paragraph (*c*) (ii) belonged to a special category. Taking a cautious approach to that delicate issue, the Special Rapporteur had worded the provision in general terms, although he could also have referred to nuclear, chemical and bacteriological weapons, which were by common consent acknowledged to have the consequences described in the provision. He himself would be prepared to accept the provision if it were approved by the majority of members and if it would encounter less resistance by those who were opposed to a specific reference to nuclear, chemical and bacteriological weapons.

9. However, a serious matter which the Commission could not evade without risking being accused of ducking the issue was that of the legality of the use of nuclear weapons and of other weapons of mass destruction. That was admittedly primarily a political question, but it could not be denied that it also had a legal dimension, as was evident from much of the literature in which it had been analysed in detail in terms of the application and interpretation of the rules relating to armed conflict, humanitarian law, the survival of mankind, genocide, the parallel with poisonous gases and with bacteriological weapons or weapons causing unnecessary, indiscriminate or disproportionate suffering, long-term effects on the environment, etc. In his view, it was legitimate to regard the use of nuclear weapons not merely as a war crime, but also as a crime against humanity and a crime against peace. The Commission might even make it a crime common to all three categories, instead of listing it under one of those headings. He therefore agreed with the members who had already urged that the Commission should seize the opportunity of dealing with that important issue and benefit from the new climate of understanding and trust among States, the awareness of world public opinion of the dangers of a nuclear accident—not to mention the disaster a nuclear war would cause—and the intense desire of the international community to live in a world free of nuclear weapons. The earlier doctrine

[5] See 2099th meeting, footnote 21.

of limited nuclear war had radically changed and public opinion was now exerting pressure on Governments to abandon such concepts. The manufacture of nuclear weapons as legitimate instruments of national defence policy must give way to the prohibition of the manufacture and use of such weapons and to the destruction of stockpiles. Nuclear disaster must be avoided by eliminating the possibility of the intentional use of nuclear weapons and by eliminating any risk of accidental explosion through a prohibition on the movement of nuclear weapons anywhere in the world. World leaders recognized that necessity. As a body that was responsible to the international community, the Commission must also come to grips with that new challenge.

10. Mr. HAYES thanked the Special Rapporteur for having done the impossible by submitting a clearly drafted list of war crimes in so short a time. He had been one of the members who had imposed that burden by saying that the code should contain something other than the general definition of war crimes given in draft article 13—which was, moreover, not even a definition *stricto sensu*. More specific guidelines should be given to the courts, no matter what courts would be called upon to try war crimes within the scope of the code, so that the code would be applied uniformly.

11. Members had already expressed concern about the possibility of wide variation in the interpretations of national courts having different backgrounds and with judges differing greatly in their experience, leading to inconsistencies in application of the code and a consequent diminution of its status. Even in a unitary jurisdiction it would be difficult to apply a general definition and, in particular, to assess the gravity of the act committed. He believed that gravity was an essential component of a war crime and therefore that the word "serious" must be retained in article 13, although it was open to divergent interpretations. A list of war crimes would assist courts in their assessment of gravity and in their interpretation of the word "serious", a task that belonged to the court in each particular case.

12. The fact remained that it seemed to be difficult to reach agreement on a list: should it be indicative or exhaustive? There was no emerging consensus on what should be included even in an indicative list. It would therefore be appropriate to consider the suggestion made by Mr. Calero Rodrigues at the previous meeting (para. 26), namely to follow the example of article 147 of the Fourth Geneva Convention of 1949 by listing elements one of which must be present to render a violation serious. Such a list would offer two advantages: first, it would give guidance to the judge on the nature of the acts covered by the code; and, secondly, it would be exhaustive in the sense that new violations could come under the general definition and their gravity could be assessed in terms of the elements listed.

13. The task was probably more difficult than it might appear to be, but that suggestion could be a way of solving the problem and reconciling the divergent views of the members of the Commission. The Commission should certainly look into that possibility before referring the matter to the Drafting Committee.

14. The CHAIRMAN, speaking as a member of the Commission, recalled that, during the debate, several members, including himself, had said that a non-exhaustive list of war crimes would be necessary in order to give substance to the abstract definition contained in draft article 13. The Commission had to be specific in describing the kind of violations to be covered by the code, whether cases were to be decided in a national court or in an international criminal tribunal. It was for that reason that the Charter of the Nürnberg Tribunal contained an indicative list of war crimes; there could be no question of leaving everything to the discretion of judges.

15. It should, however, not be forgotten that there were already rules applicable to the punishment of war crimes, as Mr. Arangio-Ruiz had pointed out several times, and that, even if the code contained no provision in that regard, it would thus be possible to apply the existing régime. To the extent that war crimes were, at the same time, grave breaches within the meaning of the 1949 Geneva Conventions and Additional Protocol I thereto, they would be subject to the universal jurisdiction of national courts under that régime.

16. The Commission did not, of course, have to repeat the definition of "grave breaches" contained in the Geneva Conventions and it could not confine itself to reproducing the list of breaches given in those Conventions, because there were many other "serious" war crimes which had their basis in other instruments and in customary law. However, it could also not question acts which were already described as grave breaches in the Geneva Conventions and in Additional Protocol I, such as the taking of hostages (art. 147 of the Fourth Convention[6]) and the deportation or transfer of civilian populations within or outside an occupied territory (art. 85, para. 4 (*a*), of Additional Protocol I[7]). The Commission was thus not required either to define new crimes or to establish whether certain acts were war crimes: that had already been done. It simply had to decide whether some of the war crimes already characterized as such were serious enough to be covered by the code.

17. If article 13 was to begin with a general definition, as proposed in the second alternative, an indicative list could be appended of specific acts illustrating the kinds of violations which were serious enough to be considered war crimes within the meaning of the code. To shape the list, he proposed three separate categories of war crimes, as set out in a document which he had circulated to members.

18. Paragraph (*a*) of the second alternative would be followed by a paragraph (*b*) reading: "Serious violations within the meaning of paragraph (*a*) are, in particular, the following acts:". Crimes against persons would then follow in a subparagraph reading:

> "(i) wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful confinement, the taking of hostages, if directed against protected persons (sick and wounded, prisoners of war, *parlementaires*, soldiers *hors de combat*, women, children, etc.), and the deportation or transfer of civilian populations from and into occupied territories."

19. The second subparagraph would refer to crimes committed on the battlefield in violation of the rules of war, but without quoting the sources. It would read:

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[6] *Ibid.*

[7] See 2096th meeting, footnote 11.

"(ii) making the civilian population, individual civilians or other protected persons the object of attack, launching an indiscriminate attack affecting civilian and other protected persons and objects, launching an attack against works or installations containing dangerous forces, in the knowledge that such an attack will cause loss of life or injury to protected persons, mass destruction and appropriation of goods not justified by military necessity."

20. The third subparagraph would cover all crimes constituted by the use of prohibited weapons. It would be based on existing law and might read:

"(iii) the unlawful use of weapons, means and methods of warfare, and particularly of weapons, means and methods of warfare which by their nature cause unnecessary suffering or strike indiscriminately at military and non-military targets; the perfidious use of the distinctive emblem of the red cross or other protective signs."

21. What he was proposing was simply a possible way of drawing up a list which could be readily amended or shortened. It would have the advantage of making the general definition more precise, but without inventing new war crimes or interfering with existing instruments. As at Nürnberg, the definition would simply state what was covered by the code.

22. As he had already said (2101st meeting), he would prefer to have a special provision defining the use of nuclear weapons as a serious war crime and a crime against humanity. That would, on the one hand, stress the importance of banning the use of such weapons in general and, on the other, supplement the code, since it would be unthinkable for such a crime to be left out. If States were not prepared to accept such a provision, they would say so.

23. In conclusion, he suggested that the Drafting Committee should be requested to complete work on the list, taking account of the suggestions made during the debate.

24. Mr. RAZAFINDRALAMBO, referring to the difference between a "violation" and a "breach", said it had already been pointed out that the term "serious" involved an element of subjective appraisal and that it could be attributed only to a "violation". Appraising the seriousness of a "violation" was thus a judicial function, whereas appraising the seriousness of a "breach" was a legislative function. That view was acceptable, in so far as a violation was an infringement of a given rule by means of an act or an omission, whereas a breach was a complex concept that had a judicial content and several constituent elements (delicts and crimes, for example). A violation and a breach were thus two different aspects of the same thing, but a breach could be seen rather as the result or consequence of a violation of the law.

25. It was therefore quite possible for a "serious violation" to take the form of a "grave breach", since it was difficult to see how a "serious violation" could be nothing more than a minor breach. At all events, the gravity of a violation of the laws of war was a *sine qua non* for a war crime or, in other words, for a breach described as a "war crime". Hence the term "serious" was crucially important in the draft code, whether the code contained no list of crimes at all or one of an illustrative or indicative nature based on the criterion of gravity.

26. Paragraph (*c*) of article 13 proposed by the Special Rapporteur had some drawbacks. Subparagraph (i) referred to "serious attacks on persons" and then to "serious harm to physical integrity or health". That might, however, simply be a drafting problem that the Drafting Committee would be able to resolve.

27. It might also be asked whether it was appropriate to refer to "serious attacks" in subparagraph (i) and to "unlawful use" in subparagraph (ii). According to the line of reasoning he had advanced at the beginning of his statement, the concept of gravity was already inherent in the concept of a violation and the crimes contained in the list were, by definition, grave breaches. Logically, therefore, attacks on persons had to be serious attacks. Similarly, the adjective "unlawful" was unnecessary because it was difficult to see how the use of methods which struck indiscriminately at military and civilian targets could be considered "lawful". The Special Rapporteur had probably been thinking of the case of self-defence. But the concept of unlawfulness was already present in the words "serious violation of the rules of international law applicable in armed conflict".

28. It was also open to question whether the element of intent had to be referred to in connection with certain crimes. There was no reason why the infliction of great suffering should have to be intentional and why, for example, causing harm to health should not. The expression "intentional homicide" was, moreover, not very apposite because it brought to mind an act committed by one individual against another. It would be better, as at Nürnberg, to refer to murder or killing.

29. As to the use of nuclear weapons, which some members wanted to include in subparagraph (ii) on weapons and methods of combat, he thought that the provision already implicitly covered the point. However, if the Commission wished to include a specific reference to nuclear weapons, he would not object.

30. Mr. Graefrath had just proposed a very detailed and appealing version of the list of crimes (paras. 18-20 above) and he reserved the right to give the Drafting Committee his own reactions to it. The comments he had just made related purely to form: in terms of substance, he fully agreed with the Special Rapporteur.

31. Finally, he suggested that the proposed list of crimes be referred to the Drafting Committee.

32. Mr. SOLARI TUDELA said that he had some problems with the words "in particular" in the introductory clause of paragraph (*c*). As Mr. Koroma (2106th meeting) had said, the words "*inter alia*" would be better. It was by no means certain that the list would be a complete enumeration of the most serious crimes and, from that point of view, the words "in particular" would be unacceptably vague, whereas the words "*inter alia*" would avoid that problem.

33. With regard to the content of the proposed list, Mr. Shi (*ibid.*) had rightly pointed out that the relevance of some of the crimes had to be questioned, since the code was supposed to cover only the most serious ones. In view of the difference of degree between, for example, the killing of hostages and the taking of hostages, the Commission had to choose between them.

34. In paragraph (*c*) (ii), the expression "the unlawful use of weapons and methods of combat" could be justified only if the square brackets were removed from the word "serious" in the general definition. Otherwise, there would be a risk of including acts which were not serious enough. In addition, the word "unlawful" gave the impression that some weapons or some of the ways in which they were used were lawful, for example in the case of self-defence. That was a risky approach, but one which the Commission should not be afraid to take.

35. In conclusion, he said he agreed with Mr. Francis's proposal (*ibid.*) that drug trafficking should be listed as a crime against humanity. That would be particularly opportune because, at present, that crime went hand in hand with terrorism, which was covered by the draft code, thus constituting a new type of crime known in some countries as "narcoterrorism".

36. Mr. TOMUSCHAT said that the task of compiling the list of crimes showed just how difficult it was to draw up an exhaustive text. The more the Commission thought about the problem, the more doubts it would have, especially because the principle *nullum crimen sine lege* meant that it had to be very careful. The problem was further complicated by the need to ensure that the future code did not clash with instruments already in force. On that point, it was necessary to be very clear: were the existing instruments to be faithfully followed—by reproducing their wording or incorporating global references to them—or was the Commission to break fresh ground, or even restrict the scope of those instruments? The Commission had chosen to follow existing texts. That was what it had done in the case of aggression and the Special Rapporteur was proposing to do so again in the case of genocide and in one of the alternative texts he had submitted on *apartheid*.

37. The list of crimes proposed in paragraph (*c*) was not entirely clear. The examples of war crimes it contained were all taken from the 1949 Geneva Conventions, in which connection he cited several articles. The Fourth Convention,[8] however, referred in article 147 to the "taking" of hostages, whereas, as pointed out by Mr. Shi (2106th meeting), the Charter of the Nürnberg Tribunal (art. 6 (*b*)) referred only to the "killing" of hostages. Article 147 also spoke of "destruction *and* appropriation of property", not of "destruction *or* appropriation of property".

38. Furthermore, the two proposed subparagraphs started with expressions that went far beyond the Geneva Conventions, subparagraph (i) referring to "serious attacks on persons and property" and subparagraph (ii) to "the unlawful use of weapons and methods of combat". In his view, the adjectives "serious" and "unlawful" should be deleted.

39. Subparagraph (ii) caused him some difficulty, for, while its wording was very similar to that used in article 51 of Additional Protocol I[9] to the Geneva Conventions, its terminology was not entirely accurate. For example, it referred to "military and non-military targets", but it was difficult to see how there could be non-military "targets" in wartime: that was a contradiction in terms. Also, as Mr. Graefrath had pointed out, the provision failed to mention one of the most serious crimes imaginable, namely "making the civilian population . . . the object of attack", as referred to in article 85, paragraph 3, of Additional Protocol I.

40. On the question of nuclear weapons, he would advise caution. So long as no rule of absolute prohibition had been implemented by States, even in the case of self-defence, it would, in his view, be impossible to make the use of nuclear weapons a crime and, to that end, to provide for individual criminal responsibility.

41. The four Geneva Conventions were already in force and constituted a system that was at once applicable and functional. Under their terms, national courts had jurisdiction over war crimes, whether those who committed such acts were nationals of the State in question or aliens. There could be no question of doing away with or limiting that system. There was, however, no need to rush. The list of crimes proposed by the Special Rapporteur deserved consideration in the further light of the text proposed by Mr. Graefrath (paras. 18-20 above). The task was difficult, but not impossible.

42. Mr. AL-KHASAWNEH said that, by the time the fourth edition of the book *The Legal Effects of War* had appeared in the 1960s, the expression "armed conflict" had become more fashionable than the term "war". In the preface to that edition, the authors had quoted Sir John Harington's words:

> Treason doth never prosper, what's the reason?
> For if it prosper, none dare call it Treason.[10]

He, too, thought that wars were still being waged, but that none dared call them wars. He therefore felt that the use of the terms "war" or "armed conflict" was a question of taste.

43. With regard to the characterization of crimes, he considered that whichever approach was adopted—whether a definition or a list—the problem would never be solved completely. As he saw it, the list approach raised three problems. First, there would always be disagreement about the inclusion in the list of a particular crime. Secondly, no list could be exhaustive, which inevitably raised the question of the ultimate usefulness of the one the Commission was trying to draw up. Thirdly, there were nuances between the crimes, but those nuances changed and the instruments by which they were recognized were themselves a reflection of the times. If the aim was to reflect all those nuances, the exact wording of the instruments already in force would have to be reproduced. But then the code would be no more than a compendium of provisions, and that was not the intention.

44. For his part, he would have preferred the approach of a definition. It would certainly be possible, however, using appropriate legal drafting, to combine it with a list. All those problems could be settled in the Drafting Committee, to which the proposed texts should be referred.

45. Mr. DÍAZ GONZÁLEZ, congratulating the Special Rapporteur on having drawn up in record time the list of war crimes requested of him, said that the Commission should not lose sight of the mandate entrusted to it by the General Assembly, which was to prepare a *code* of crimes.

[8] See 2099th meeting, footnote 21.

[9] See 2096th meeting, footnote 11.

[10] A. D. McNair and A. D. Watts, *The Legal Effects of War*, 4th ed. (Cambridge, The University Press, 1966), p. vii.

Thus, according to the principle of legality, under which there could be no offence without a law, it had to decide which acts constituted war crimes. Obviously, it could do so only on the basis of the international instruments in force and, in particular—but not only—on the basis of the 1949 Geneva Conventions. As Mr. Al-Khasawneh had just pointed out, however, its work was not simply to make a compilation of existing instruments.

46. At the outset of his work on the topic, the Special Rapporteur had put forward a series of arguments to show that acts constituting grave violations of the laws applicable to armed conflict should be regarded as war crimes. That criterion of gravity, used by the Special Rapporteur to distinguish a war crime from an ordinary crime, was taken from the Geneva Conventions, in which there had also appeared, for the first time, the distinction between a violation and a breach. In his view, that was an extremely subtle distinction, since the two terms were in fact synonymous. The Geneva Conventions, however, dealt with violations of pre-existing obligations, whereas the work of the Commission was to draft an instrument from which obligations would arise for States, namely to refrain from committing the acts characterized as crimes. War crimes having been defined as the most serious crimes, there was no need for the Commission to ask itself about their degree of gravity or to be concerned with determining which court would apply the code. That court, of whatever kind, would have to take account of the degree of gravity of the act only in order to decide whether to admit mitigating or aggravating circumstances, not to characterize the act as a crime, for that was precisely what the code should do.

47. For his own part, he was neither for nor against the list method. He would perhaps favour a provision that would combine a general definition with an indicative list, provided it did not simply quote, or refer to, existing instruments, but reflected a serious attempt to arrive at a definition. The Commission could, as Mr. Shi (2106th meeting) had suggested, adopt the method used for article 19 of part 1 of the draft articles on State responsibility[11] and devote a separate subparagraph to each act characterized as a crime. In any event, the main thing was for the code to determine which acts constituted crimes, for characterization should not be left to the discretion of those who would apply the code.

48. With regard to subparagraph (ii) of the list proposed by the Special Rapporteur in paragraph (*c*), he noted that the Commission had already discussed the question of the use of nuclear weapons at some length. It was true that it was a multifaceted question: mention had already been made of the problem of reprisals and, in addition, there was the problem of self-defence. It was true, too, that the code was not meant to apply to States, but to individuals, and that it was difficult to imagine an individual being able to use a nuclear weapon. The international community would, however, not understand how the most abhorrent means of war, the most inhuman means of mass destruction, could be excluded from a code of war crimes. He was therefore convinced that the Commission should make the use of nuclear weapons a crime. The political risks to which reference had been made did exist, but a legal body such as the Commission did not have to pay too much attention to them.

49. As for referring the proposed list to the Drafting Committee, every time the Commission encountered a delicate problem it should not, in his view, pass it on to the Drafting Committee, whatever the latter's merits might be. When it came to such a basic issue, the problems should be resolved in plenary after a very thorough discussion.

50. Mr. THIAM (Special Rapporteur), replying to the comments made by members on paragraph (*c*) of draft article 13, said that the law of war was one of the most closely regulated subjects and that there was no lack of provisions on war crimes. He could therefore easily have incorporated all those provisions, but he had not thought that such a compilation would serve much purpose. Admittedly, in the part of the draft which dealt with crimes against humanity he had used the provisions of existing conventions almost in full. However, while a list of crimes against humanity was feasible, the same did not apply to war crimes, and those who had made such attempts following the two World Wars had had to give up the idea. While he had not repeated the provisions of existing conventions literally, however, he had at least made certain not to depart from their terms, since it would be unwise to try to be innovative in that area. War crimes were the subject of a traditional set of rules that was solid, well-defined and formed part of the law of war, which, through its treaty and customary rules, had a recognized place in international law.

51. The list of war crimes proposed in paragraph (*c*) was based chiefly on article 147 of the Fourth Geneva Convention, but also on other articles of the 1949 Geneva Conventions. In his view, it would again be preferable not to depart from their terms as regards drafting. He therefore regarded as dangerous some of the proposals made by members, particularly the distinction drawn by Mr. Barboza (2106th meeting) between violations and breaches. In French law at any rate, the two terms were synonymous and it would be better to avoid innovations that might disturb the established terminology. Since the expression "grave breaches" had a specific technical meaning, as laid down in the Geneva Conventions and in Additional Protocol I thereto, its use should be reserved for the offences set forth restrictively in those instruments. Moreover, as he explained in his seventh report (A/CN.4/419 and Add.1, para. 19), the concept of "war crimes" was broader than that of "grave breaches" within the meaning of the Geneva Conventions, since it also covered breaches of the law of war; he had therefore proposed that the word "violations" should be used, but without seeking to establish a general distinction between violations and breaches.

52. The other comments made by members were more matters of drafting. Mr. Graefrath had proposed that the list should be supplemented by other crimes, which the Drafting Committee would have no difficulty in doing, since the proposed text did not claim to be exhaustive.

53. Some members had asked which persons and property were covered by paragraph (*c*) (i). The answer was easy: all those protected by the Geneva Conventions—and hence, above all, civilian populations. In the same subparagraph, the expression "intentional homicide" had been criticized. While the expression was perhaps not suitable in English, the French text was taken literally from the Geneva

[11] See 2096th meeting, footnote 19.

Conventions, which were more comprehensive on that point than the Charter of the Nürnberg Tribunal, which provided only for murder. Also in paragraph (*c*) (i), it would be better to refer to "destruction *or* appropriation" than to "destruction *and* appropriation", since one could occur without the other. That, too, was a point which could be settled by the Drafting Committee.

54. As had been noted, much could be said with regard to paragraph (*c*) (ii), particularly concerning reprisals. The place for all such considerations was, however, in the commentary to the articles, rather than in the body of the text itself.

55. The majority of the members of the Commission considered that the proposed list should be referred to the Drafting Committee. For his own part, he did not want the question of the respective powers of the Drafting Committee and the Commission to be discussed once again. If it was necessary to wait until the list received the unanimous agreement of all members, it would never be referred to the Drafting Committee, unless it was put to the vote—and that would be contrary to the Commission's practice. That practice had always been to refer to the Drafting Committee any draft articles on which the Commission had been unable to reach agreement. In the circumstances, how could it be explained to the Sixth Committee of the General Assembly why the text under consideration had not been referred to the Drafting Committee? The Commission must decide whether or not it wanted a list. He was fully prepared, once again, to abide by the Commission's decision, but it would not be right, in the case of that particular provision, to invoke the argument that there was lack of agreement among members.

56. The CHAIRMAN suggested that the proposed list of crimes should be referred to the Drafting Committee and that the Committee should try, in the light of the comments and proposals made during the discussion, to formulate a text which the Commission could discuss in a more constructive manner.

57. Mr. DÍAZ GONZÁLEZ said that he was not opposed to that suggestion. In reply to the comments by the Special Rapporteur, however, he pointed out that what the Commission submitted to the Sixth Committee was the outcome of its own work, not that of the Drafting Committee's work.

58. Mr. McCAFFREY said that he was not opposed to the proposed list being referred to the Drafting Committee. As a general rule, however, it was better that a question should first be discussed in detail in plenary so that the Drafting Committee would have all the necessary information.

59. Mr. FRANCIS recommended that illicit drug trafficking, a question to which Mr. Reuter had drawn the Commission's attention in 1985,[12] should be included as a crime in the draft code. Mr. Barsegov (2102nd meeting) and Mr. Solari Tudela had stated that, although drug trafficking was already covered by a number of existing instruments, it should also be included in the code on the same basis as aggression, genocide and serious crimes. He agreed with that view and was convinced that the Drafting Committee should consider the question, which could be dealt with both under the heading of crimes against peace and under that of crimes against humanity.

60. As Mr. Reuter had pointed out in 1985, illicit drug trafficking had a destabilizing effect on some countries, particularly smaller ones, and hampered the smooth functioning of international relations. The Caribbean and Latin-American countries had learned that to their cost. He regretted that the question had not been discussed in the Commission until now because of the lack of interest on the part of its members. Over the years, however, he had collected information that showed just how enormous the problem had become. A few years previously, for example, drug traffickers in Latin America had, fortunately without success, offered officials in charge of drug traffic control more than $US 300 million if they would cease their activities. Some time later, after customs officials in a European country had intercepted an enormous quantity of drugs, the authorities of that country had had to call on the three branches of the armed forces to conduct constant surveillance in order to prevent attempts to import drugs. The media were full of examples of that kind. Members of the Commission could not remain indifferent to the problem and, as citizens, should assume their responsibilities by considering the possibility of including that crime in the draft code, for, in addition to its destabilizing aspect, which made it a crime against peace, it had recently taken on the dimensions of a crime against humanity.

61. In that connection, he said that, originally, the drugs exported by traffickers had been intended for addicts who had bought them voluntarily. But the situation was different now: potential buyers were no longer only voluntary users. The new strategy was to establish a society where people would become addicted not voluntarily, but by force, and where traffickers would encourage children and young people to use drugs so that they would later have a steady supply of adult customers. Young people were thus lured with "crack", with sweets and drinks laced with drugs and with substances to be sniffed, which all led to addiction. According to a newspaper article he had read, 1 person in 10 in a large city in Asia was a drug addict. Elsewhere, an eight-year-old child had just been imprisoned for being a courier for the transport of hard drugs. In a Caribbean country, two children under the age of seven who had been forced to use drugs had had to undergo psychiatric treatment for detoxification. The drug barons were obviously implementing a strategy that was designed to perpetuate the drug culture by focusing on young people, who, after having tried drugs, became incapable of deciding for themselves whether they wished to fall into that vice or not and stayed addicted all their lives unless they had an opportunity to receive treatment.

62. Lastly, he quoted the third preambular paragraph of the 1961 Single Convention on Narcotic Drugs,[13] which read: " . . . addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind". Under article 36, paragraph 2 (*a*) (iv), of that Convention, moreover, "serious offences . . . committed either by nationals or by foreigners shall be

[12] *Yearbook . . . 1985*, vol. I, pp. 9-10, 1879th meeting, para. 31.

[13] Single Convention on Narcotic Drugs, 1961, as amended by the Protocol of 25 March 1972 (United Nations, *Treaty Series*, vol. 976, p. 105).

prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found". The Commission might draw inspiration from those texts.

63. Mr. REUTER reminded members that the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances had been signed in Vienna on 20 December 1988.[14] Its basic thrust was the establishment of universal jurisdiction and the obligation for States either to extradite or to prosecute. The Convention, which had already been signed by 64 States and should enter into force in late 1990, did not deal with the offences being discussed by the Commission, namely those committed by an individual as the representative of a State. It did, however, contain a definition of the "seriousness" of the acts in question and stated that an offence was deemed "particularly serious" because of "the fact that the offender holds a public office and that the offence is connected with the office in question" (art. 3, para. 5 (*e*)). Articles 4, 6, 7, 8 and 9, which dealt respectively with jurisdiction, extradition, mutual legal assistance, transfer of proceedings and other forms of co-operation and training, could be of interest to the members of the Commission, to whom it would be useful to distribute the text of the Convention.

64. For a long time, it had been believed that, in the case of illicit drug trafficking by sea, there was justification for universal jurisdiction, including the right of search on the high seas over vessels flying a flag other than that of the State conducting the search or even no flag at all. It had been hoped that a provision along those lines could be adopted as early as 1958, but, at the 1988 Vienna Conference, it had been decided that States would not have universal jurisdiction for pursuit on the high seas. They would therefore have to rely on bilateral conventions.

65. His own view was that, in order to discuss that question, the Commission would have to wait until an official commentary to the 1988 Convention had been published. It would therefore be premature to take a decision on the question at present, even if the participants in the Vienna Conference were known to have shown a great deal of enthusiasm for action to combat the illicit drug traffic.

66. Lastly, he said that, since he did not share the views of the Chairman and the Special Rapporteur on the work in progress, he might not be able to associate himself with the list of crimes or with the draft code as a whole. As he saw it, the proposed list was not in keeping with what a serious convention should be.

67. Mr. DÍAZ GONZÁLEZ said that the problem of illicit drug trafficking, which Latin-Americans had to deal with every day and which had taken on global proportions, was not a new one and he recalled that, in the nineteenth century, a great colonial Power had waged the opium wars against China to impose the use of drugs for purposes of trade. Today, that crime was committed not by States, but by individuals or by multinational or transnational corporations which handled fabulous amounts of money and were a threat to Governments precisely because the resources they possessed were sometimes larger than the budget of the State in whose territory they operated. The laundering of such drug money also created problems in other countries. For those reasons, he supported the idea of including illicit drug trafficking as a crime against peace and against humanity, as Mr. Francis had proposed.

68. Mr. THIAM (Special Rapporteur) said that the question of illicit drug trafficking had been raised during the consideration of one of his earlier reports. At the time, he had not been much in favour of making such trafficking a crime because he had had the impression that it was an ordinary offence, the basic motive for which was to make money. Developments which had taken place since then nevertheless suggested that, although the traffickers' purpose was still to make money, political considerations might also be involved and that, in any case, the consequences of the crime were often of a political nature. In the circumstances, he would have no objection to dealing with the question in two provisions, one under the heading of crimes against peace and the other under that of crimes against humanity. The question could be referred to the Drafting Committee.

69. The CHAIRMAN said that, although no member of the Commission had objected to the idea of including illicit drug trafficking as a crime within the meaning of the draft code, it might be better if the Commission first had a text on the subject, which could then be referred to the Drafting Committee.

70. Mr. THIAM (Special Rapporteur) suggested that Mr. Francis should be requested to prepare such a text.

71. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he had no objection to the Special Rapporteur's suggestion, but pointed out that usually, when the Commission referred draft articles to the Drafting Committee, it requested the Committee to take account of all the opinions expressed during the discussion. The Drafting Committee could therefore consider the question even without a text.

72. Mr. KOROMA said he was not sure that the Commission had reached the stage where it could draft a provision on the question.

73. The CHAIRMAN said that the Commission could either request the Drafting Committee to prepare a text based on the discussion which had taken place in plenary or wait for a proposal by the Special Rapporteur which it could then refer to the Drafting Committee.

74. Mr. McCAFFREY said that he thought it would be better to discuss all aspects of the question, taking account of the work of the 1988 United Nations Conference in Vienna, before entrusting any task to the Drafting Committee. He would, however, have no formal objection if the question were referred to the Drafting Committee.

75. The CHAIRMAN suggested that the Special Rapporteur should be requested to prepare a draft text on illicit drug trafficking which the Commission could consider before referring it to the Drafting Committee.

It was so agreed.

The meeting rose at 1.05 p.m.

[14] For the text, see E/CONF.82/15 and Corr.2.

2108th MEETING

Tuesday, 30 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

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

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/384,[1] A/CN.4/413,[2] A/CN.4/423,[3] A/CN.4/L.431, sect. B)[4]

[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

ARTICLES 1 TO 17

1. The CHAIRMAN invited the Special Rapporteur to introduce his fifth report on the topic (A/CN.4/423), as well as the revised draft articles 1 to 9[5] and the new draft articles 10 to 17 contained therein, which read:

CHAPTER I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles shall apply with respect to activities carried on in the territory of a State or in other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control, when the physical consequences of such activities cause, or create an appreciable risk of causing, transboundary harm throughout the process.

Article 2. Use of terms

For the purposes of the present articles:

(a) (i) "Risk" means the risk occasioned by the use of things whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them likely to cause transboundary harm throughout the process, notwithstanding any precautions which might be taken in their regard;

(ii) "Appreciable risk" means the risk which may be identified through a simple examination of the activity and the things involved, in relation to the place, environment or way in which they are used, and includes both the low probability of very considerable [disastrous] transboundary harm and the high probability of minor appreciable harm;

(b) "Activities involving risk" means the activities referred to in subparagraph (a), in which harm is contingent, and "activities with harmful effects" means those causing appreciable transboundary harm throughout the process;

(c) "Transboundary harm" means the effect which arises as a physical consequence of the activities referred to in article 1 and which, in the territory or in places under the jurisdiction or control of another State, is appreciably detrimental to persons or objects, to the use or enjoyment of areas or to the environment, whether or not the States concerned have a common border. Under the régime of the present articles, "transboundary harm" always refers to "appreciable harm";

(d) "State of origin" means the State in whose territory or in places under whose jurisdiction or control the activities referred to in article 1 take place;

(e) "Affected State" means the State in whose territory or under whose jurisdiction persons or objects, the use or enjoyment of areas, or the environment are or may be appreciably harmed.

Article 3. Assignment of obligations

1. The State of origin shall have the obligations established by the present articles provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried on in its territory or in other places under its jurisdiction or control.

2. Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in paragraph 1.

Article 4. Relationship between the present articles and other international agreements

Where States Parties to the present articles are also parties to another international agreement concerning activities referred to in article 1, in relations between such States the present articles shall apply subject to that other international agreement.

Article 5. Absence of effect upon other rules of international law

ALTERNATIVE A

The fact that the present articles do not specify circumstances in which the occurrence of transboundary harm arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule of international law.

ALTERNATIVE B

The present articles are without prejudice to the operation of any other rule of international law establishing liability for transboundary harm resulting from a wrongful act.

CHAPTER II

PRINCIPLES

Article 6. Freedom of action and the limits thereto

The sovereign freedom of States to carry on or permit human activities in their territory or in other places under their jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States.

Article 7. Co-operation

States shall co-operate in good faith among themselves, and request the assistance of any international organizations that might be able

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[1] Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

[5] Revised texts of draft articles 1 to 10 submitted by the Special Rapporteur in his fourth report (A/CN.4/413) and referred to the Drafting Committee by the Commission at its fortieth session (for the texts, see *Yearbook . . . 1988*, vol. II (Part Two), p. 9, para. 22).

to help them, in trying to prevent any activities referred to in article 1 carried on in their territory or in other places under their jurisdiction or control from causing transboundary harm. If such harm occurs, the State of origin shall co-operate with the affected State in minimizing its effects. In the event of harm caused by an accident, the affected State shall, if possible, also co-operate with the State of origin with regard to any harmful effects which may have arisen in the territory of the State of origin or in other places under its jurisdiction or control.

Article 8. Prevention

States of origin shall take appropriate measures to prevent or, where necessary, minimize the risk of transboundary harm. To that end they shall, in so far as they are able, use the best practicable, available means with regard to activities referred to in article 1.

Article 9. Reparation

To the extent compatible with the present articles, the State of origin shall make reparation for appreciable harm caused by an activity referred to in article 1. Such reparation shall be decided by negotiation between the State of origin and the affected State or States and shall be guided, in principle, by the criteria set forth in the present articles, bearing in mind in particular that reparation should seek to restore the balance of interests affected by the harm.

CHAPTER III

NOTIFICATION, INFORMATION AND WARNING BY THE AFFECTED STATE

Article 10. Assessment, notification and information

If a State has reason to believe that an activity referred to in article 1 is being, or is about to be, carried on in its territory or in other places under its jurisdiction or control, it shall:

(*a*) review that activity to assess its potential transboundary effects and, if it finds that the activity may cause, or create the risk of causing, transboundary harm, determine the nature of the harm or risk to which it gives rise;

(*b*) give the affected State or States timely notification of the conclusions of the aforesaid review;

(*c*) accompany such notification by available technical data and information in order to enable the notified States to assess the potential effects of the activity in question;

(*d*) inform them of the measures which it is attempting to take to comply with article 8 and, if it deems it appropriate, those which might serve as a basis for a legal régime between the parties governing such activity.

Article 11. Procedure for protecting national security or industrial secrets

If the State of origin invokes reasons of national security or the protection of industrial secrets in order not to reveal some information which it would otherwise have had to transmit to the affected State:

(*a*) it shall inform the affected State that it is withholding some information and shall indicate which of the two reasons mentioned above it is invoking for that purpose;

(*b*) if possible, it shall transmit to the affected State any information which does not affect the areas of reservation invoked, especially information on the type of risk or harm it considers foreseeable and the measures it proposes for establishing a régime to govern the activity in question.

Article 12. Warning by the presumed affected State

If a State has serious reason to believe that it is, or may be, affected by an activity referred to in article 1 and that that activity is being carried on in the territory or in other places under the jurisdiction or control of another State, it may request that State to apply the provisions of article 10. The request shall be accompanied by a documented technical explanation setting forth the reasons for such belief.

Article 13. Period for reply to notification. Obligation of the State of origin

Unless otherwise agreed, the notifying State shall allow the notified State or States a period of six months within which to study and evaluate the potential effects of the activity and to communicate their findings to it. During such period, the notifying State shall co-operate with the notified State or States by providing them, on request, with any additional data and information that is available and necessary for a better evaluation of the effects of the activity.

Article 14. Reply to notification

The State which has been notified shall communicate its findings to the notifying State as early as possible, informing the notifying State whether it accepts the measures proposed by that State and transmitting to that State any measures which it might itself propose in order to supplement or replace such proposed measures, together with a documented technical explanation setting forth the reasons for such findings.

Article 15. Absence of reply to notification

1. If, within the period referred to in article 13, the notifying State receives no communication under article 14, it may consider that the preventive measures and, where appropriate, the legal régime which it proposed at the time of the notification are acceptable for the activity in question.

2. If the notifying State did not propose any measure for the establishment of a legal régime, the régime laid down in the present articles shall apply.

Article 16. Obligation to negotiate

1. If the notifying State and the notified State or States disagree on:

(*a*) the nature of the activity or its effects; or

(*b*) the legal régime for such activity,

ALTERNATIVE A

they shall hold consultations without delay with a view to establishing the facts with certainty in the case of (*a*) above, and with a view to reaching agreement on the matter in question in the case of (*b*) above.

ALTERNATIVE B

they shall, unless otherwise agreed, establish fact-finding machinery, in accordance with the provisions laid down in the annex to the present articles, to determine the likely transboundary effects of the activity. The report of the fact-finding machinery shall be of an advisory nature and shall not be binding on the States concerned. Once the report has been completed, the States concerned shall hold consultations with a view to negotiating a suitable legal régime for the activity.

2. Such consultations and negotiations shall be conducted on the basis of the principle of good faith and the principle that each State must show reasonable regard for the rights and legitimate interests of the other State or States.

Article 17. Absence of reply to the notification under article 12

If the State notified under the provisions of article 12 does not give any reply within six months of receiving the warning, the presumed affected State may consider that the activity referred to in the notification has the characteristics attributed to it therein, in which case the activity shall be subject to the régime laid down in the present articles.

2. Mr. BARBOZA (Special Rapporteur) said that a corrigendum to his fifth report (A/CN.4/423) would be issued shortly, indicating that the word "injury" had been replaced throughout the report and the draft articles by the

word "harm". At the previous session, the English-speaking members of the Commission had preferred the term "harm" because it conveyed a meaning free of any connotation of wrongfulness.

3. Two aspects of the present topic had not been considered up to now by the Commission but had been the object of considerable reflection on his part. They had not been dealt with in the fifth report because of lack of time and also because some of the underlying ideas required further work by him. The first aspect was the procedure and responsibility in the case of an activity involving the risk of very extended damage in which the notification and negotiation procedures would perhaps involve many countries and possibly require the intervention of an international organization. The second aspect concerned the issues relating to activities which caused or could cause harm beyond national jurisdictions, a matter of obvious interest to the international community. If either aspect were left out, the draft would be incomplete. In fact, developments such as *erga omnes* obligations, international crimes of the State, *jus cogens*, and perhaps the protection of human rights and the marine environment pointed to the existence of a kind of "public order" in the law of nations.

4. Liability for harm caused beyond national jurisdictions no doubt presented difficult problems, but it fell fully within the purview of the topic. Some of the most important and injurious consequences of activities not prohibited by international law were felt in what had been called "the commons" of mankind: the atmosphere, the climate, the marine environment beyond national jurisdictions, etc. The fact that such liability might exist towards the international community as a whole rather than towards a particular State did complicate the present task but should not deter the Commission from undertaking it. The Commission was duty-bound to make its contribution to the legal concepts that would permit the international community to cope with the overwhelming by-products of technological advances. The law on liability was an area in which little progress had been made, despite the urgent need for speedy development. As early as 1972, Principle 22 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)[6] had recommended that States should develop the law of liability. Since then, there had been numerous conventions on activities of the type concerned but not much had been done as regards the prevention or reparation of the injurious consequences of those activities, except in the area of the civil liability of the operator and a subsidiary liability of the State in certain cases.

5. His fifth report consisted of three main parts. Section I was an introduction regarding the concept of risk, the role it had played in his fourth report (A/CN.4/413) and the reasons for changing that role. Sections II and III dealt with the revised draft articles 1 to 9 which he now proposed, in the light of the observations made in the Commission and in the Sixth Committee of the General Assembly, to replace draft articles 1 to 10 as referred to the Drafting Committee at the previous session.[7] Sections IV to IX dealt with the new draft articles 10 to 17 relating to procedural matters.

6. The introduction served the important purpose of explaining why he had given room in the draft to a very important and consistent current of thought which had manifested itself both in the Commission and in the Sixth Committee, namely the trend in favour of basing liability on harm and not only on risk. In the fourth report, risk had been introduced as a pivotal concept with the idea of establishing a much needed limit to the scope of the topic. Risk also played an important role in the revised articles, but not that of limiting the draft to dangerous activities. The drafting had been modified in such a way as to admit explicitly activities which caused harm "throughout the process" of their development. A limit was none the less essential, and was provided by the concept of "activities" as the sole object of the topic. That point was explained in the fifth report (A/CN.4/423, paras. 11-13). The distinction between "acts" and "activities", already studied in previous reports (*ibid.*, footnote 11), had important consequences. If the topic were limited to "activities", it would not deal with liability attaching to isolated acts; as a result, not all harm produced by any act would be a matter for the present topic. Paragraph 13 of the report was important, since it sought to show that responsibility in the sense of "consequences of certain conduct" could refer only to acts, not to activities, and that, if the focus was shifted from "acts" to "activities", the title of the topic acquired broader scope: the Commission would not be dealing only with the consequences of acts—one of the meanings of responsibility—but also with the task of determining responsibilities (obligations) as a condition for the development of activities and eventually establishing obligations of prevention in that regard. That reasoning tended to clarify any confusion which might arise from the association of concepts such as "acts" and "liability" for them, in the title of the topic, and to show that the Commission was acting within the scope of its mandate from the General Assembly even if it established obligations of prevention, the breach of which could constitute wrongfulness.

7. The revised articles of chapter I (General provisions) and chapter II (Principles) of the draft had been reduced in number from 10 to 9 as a result of the merger of previous draft articles 7 and 8. Section III of the report contained explanatory comments on each of the articles for the benefit of the Commission and, in particular, the Drafting Committee.

8. In draft article 1, the words "cause, or create an appreciable risk of causing, transboundary harm" represented an attempt to cover activities involving risk and those with harmful effects. Moreover, the idea of "appreciable risk", which was accepted in international practice, had been retained. It should be stressed that, in activities involving risk, the "appreciable risk" mentioned must be the risk of causing "appreciable harm" in order to justify prevention being demanded. Despite the fact that the limits of appreciable risk and appreciable harm were somewhat blurred, the adjective "appreciable" had to be applied to both concepts. It had also been used to qualify the term "harm" in the draft articles on the law of the non-navigational uses of international watercourses. It was highly desirable that, in view of the similarity between the two topics, the terms used in both should be harmonized.

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

[7] See footnote 5 above.

9. "Transboundary harm" meant "appreciable transboundary harm", a point that was made clear in draft article 2 (*c*). In his fourth report (A/CN.4/413, paras. 8-15), he had dealt with the question whether the topic included activities which caused appreciable transboundary harm by pollution, the effects of which were normally cumulative. In the fifth report (A/CN.4/423, para. 9), he drew attention to the difficulties arising from the fact that the polluting effects were foreseeable: the harm was an inevitable consequence of the activity itself. In the fourth report he had advocated the inclusion of those kinds of activities within the scope of the topic, for if activities involving risk, or contingent harm, were included then it was all the more logical that those which were bound to cause harm should be included too.

10. In draft article 2 (*a*) (i), the phrase "notwithstanding any precautions which might be taken in their regard" pointed to the basic characteristic of liability for risk, namely the absence of fault and the irrelevance of "due diligence". The comments made in earlier debates that activities with a low probability of causing disastrous harm should be included were accommodated in subparagraph (*a*) (ii) on "appreciable risk". Subparagraph (*b*) introduced the qualification "with harmful effects" for certain activities, such as polluting activities, which caused harm. It was understood that such activities were not totally harmful: they were permitted because their usefulness outweighed the harm they caused.

11. The term "places", in subparagraph (*c*), replacing the term "spheres" used in the previous text, was intended to indicate that transboundary harm could affect not only a State's territory, but also other areas where the State exercised jurisdiction as recognized by international law. For example, in the exclusive economic zone, an oil rig or a vessel of a coastal State could be damaged as a result of an activity carried on by a vessel of another State or from land or from an aircraft registered in another State. The case of a vessel of one State whose activity caused harm to the vessel of another State while both vessels were on the high seas was another instance of transboundary harm.

12. The case of a place or territory "under the control" of another State presented certain difficulties. A possible initial reaction would be to deny the status of affected State to a State which was exercising control of a territory in violation of international law. The result, however, would be to leave the inhabitants of the territory without international protection in the event of harm to their environment. Two courses were then possible. One was to accord the status of affected State to the State exercising control only in so far as it was responsible for fulfilling certain international duties towards the population, for instance protecting their human rights. Another possibility was to accord that status to the entity which had legal jurisdiction over the territory: either the State lawfully entitled to the territory or a body appointed to represent it, as in the case of the United Nations Council for Namibia. On that issue, he had not proposed any text and awaited the opinions of members of the Commission.

13. In subparagraph (*e*), on the meaning of the expression "affected State", a reference to "the environment" had been added. Although it could have been considered as covered by the previous definition, the environment had become such a major concern that it must be included in the definition of harm so as to leave no room for doubt that the draft sought to protect the environment.

14. The title of draft article 3 had been changed from "Attribution" to "Assignment of obligations", because the word "attribution" was used in part 1 of the draft articles on State responsibility[8] and it was necessary to use a different term. In the articles on State responsibility, the term "attribution" was used to refer to the attribution of an act to a State. Hence, since "attribution" simply meant the "imputation" of acts, it would not be appropriate to use the term in the present topic: it was not an activity—much less an act—that was being imputed or attributed to a State, but rather certain obligations deriving from the fact that a given activity was being carried on. Paragraph 2 of article 3 provided for a presumption that a State had knowledge or means of knowing that an activity referred to in article 1 was being carried on in its territory or in places under its jurisdiction or control. The burden of proof to the contrary rested with that State.

15. The revised text of draft article 5 was perhaps less awkward and offered the possibility of an interesting discussion on the coexistence of the régime of responsibility for wrongfulness with that of causal liability. In his comments on the article (*ibid.*, paras. 41 *et seq.*), he considered the case of paragraph 2 of draft article 16 [17] on pollution in the topic of the law of the non-navigational uses of international watercourses and the obligation therein was analysed as one of result, as under article 23 of part 1 of the draft articles on State responsibility. He concluded that, if the draft articles applied to States which were parties to another treaty—on the non-navigational uses of international watercourses, for example—and appreciable harm from pollution was caused to one of them through an activity in the territory or under the jurisdiction or control of another State, there were two possibilities: either the State of origin was responsible for the wrongful conduct of not having used due diligence or, if it had employed due diligence and an accident had nevertheless occurred, it was causally liable.

16. Ironically, the least harsh solution for the State of origin would perhaps be the existence of a single régime: that of causal, or strict, liability. Prevention would not then be required as a separate obligation, but would simply arise from the deterrent effect of reparation under the régime of strict liability. The conclusions stated in his report (*ibid.*, para. 50) could well be kept in mind in that connection.

17. It was also useful to imagine what would happen if, under the present draft, obligations of due diligence were imposed, so that a breach would entail wrongfulness. That situation had been viewed in the early debates on the topic as an insurmountable obstacle to obligations of prevention. In his report (*ibid.*, para. 49), he had repeated a line of reasoning set out in his previous reports and designed to allay that concern. If the obligation of prevention under draft article 8 was one of result, the draft articles would function in essence in the same way as two conventions, except that the two régimes—one of responsibility for wrongfulness and one of causal liability—would coexist in the same instrument (*ibid.*, para. 48).

[8] *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

18. Draft article 7 sought to enunciate more specifically the obligations stemming from the principle of co-operation. The article referred to both types of activities mentioned in article 1. In the case of those involving risk, co-operation must be aimed at minimizing the risk. In the case of those with harmful effects, co-operation must be aimed at keeping those effects below the threshold of appreciable harm. The reference to international organizations in article 7 was necessary, for their main purpose was to promote co-operation among States: a number of such organizations, or their programmes, were particularly well equipped to assist States in matters within their sphere of competence. A State of origin could not be considered to have complied with its obligation to co-operate in seeking to prevent the occurrence of appreciable harm if, in a particular case in which the assistance of a given organization might have been useful, it had not requested such assistance.

19. Draft article 8 set forth the principle of prevention. The previous text (previous draft article 9) had said that States must take "all reasonable preventive measures to prevent or minimize injury . . . ". The revised wording required States to take "appropriate measures to prevent or, where necessary, minimize the risk of transboundary harm". That duty was not absolute, for the article went on to say: "To that end they shall, in so far as they are able, use the best practicable, available means . . . ".

20. Thus, if an activity was carried on by a State or one of its agencies or enterprises, it was the State or its enterprises that would have to take the corresponding preventive measures. If those activities were carried on by private individuals or corporations, they would have to institute the actual means of prevention and the State would have to impose and enforce the corresponding obligation under its domestic law. In that regard, account had to be taken of the special situation of developing countries, which so far had suffered most from, and contributed least to, the global pollution of the planet. It was for that reason that, in referring to the means to be used, article 8 said that States had to use them "in so far as they are able" and that such means must be "available" to those States.

21. If an approach based exclusively on strict liability were adopted, obligations of prevention would be subsumed in those of reparation. In that case, article 8 would have to be interpreted as stipulating a form of co-operation, and a breach of such obligations would not imply any right of jurisdictional protection. In that connection, he would draw attention to section 2 (8) and section 3 (4) of the schematic outline submitted by the previous Special Rapporteur, which specified that failure to take any steps required by the rules on co-operation did not "in itself give rise to any right of action".

22. Draft article 9 reproduced the content of the previous draft article 10. Although the meaning had not been altered, the reference to the fact that harm "must not affect the innocent victim alone" had been deleted, since it had been criticized as inappropriate in possibly giving the impression that the innocent victim must bear the major burden of the harm. That had not, of course, been the meaning intended; the phrase had endeavoured to convey the idea that reparation did not strictly follow the principle of *restitutio in integrum* which applied in responsibility for wrongfulness. That was because harm was not, in the present case, the result of a wrongful act but the expected result of a lawful activity, the assessment of which involved complex criteria. Some explanations in that regard were given in the report (*ibid.*, para. 70). Reparation would have to be the subject of negotiation in which all the factors involved were weighed and agreement was reached on the sum of money the State of origin was to pay to the affected State or on the measures it was to take for the latter's benefit. Reparation should seek to restore the balance of interests affected by the harm, since harm in the present topic could be defined as a certain effect which, being detrimental to the affected State, upset the balance of interests involved in the activity which caused it. Accordingly, reparation, without necessarily being equivalent to all the harm considered in isolation in each case, must be such as to restore the balance of interests involved.

23. The new articles 10 to 17 of chapter III of the draft (Notification, information and warning by the affected State) related to procedural matters. Draft articles 10 to 12 dealt with the first stage of the procedure for the prevention of harmful effects and the formulation of a régime for the activities referred to in article 1, including the protection of national security or industrial secrets. Draft articles 13 to 17 dealt with the steps following notification by the State of origin of the existence of an activity referred to in article 1.

24. The general comments on articles 10 to 12 contained in section V of the report indicated the legal grounds for the obligation of the State of origin to notify States which might be affected that such an activity was being, or was about to be, carried on in its territory or in other places under its jurisdiction or control. Notification was inseparable from the other obligations laid down in article 10. Indeed, the three functions of assessment, notification and information were interlinked. For example, a State could not be notified of potential risk unless the State of origin had first made an assessment of the possible effects in other jurisdictions of the activity in question. Nor could information be supplied about the activity unless the affected State was also warned of the dangers involved.

25. The three obligations set out in draft article 10 derived, first, from the general duty to co-operate, and secondly, from the duty of States to refrain from knowingly permitting their territory to be used for acts contrary to the rights of other States. Regarding the first duty, in some cases joint action was needed by both States—the State of origin and the affected State—if prevention was to be effective. The affected State might be able to prevent transmission to its own territory of the harmful effects by taking certain measures itself; or the exchange of information might enable the harmful effects to be warded off if the affected State possessed appropriate technology for the problem. The participation of the affected State was therefore necessary if prevention was to succeed, and the State of origin was likewise bound to agree to such participation.

26. The second duty was expressed in a general rule deriving from international case-law. In the *Trail Smelter* case, it had been stated by the arbitral tribunal in the following terms: "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes

in or to the territory of another or the properties or persons therein".[9] In the *Corfu Channel* case, it had been stated by the ICJ in more general terms as "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[10]

27. Under draft article 10, the State of origin had, first, to assess the potential effects of the activity (subpara. (*a*)), secondly, to notify the affected State if the assessment indicated harmful transboundary effects or risk (subpara. (*b*)), and thirdly, to transmit the available technical information so that the affected State could arrive at its own conclusions as to the potential effects of the activity (subpara. (*c*)). Subparagraph (*d*) required the State of origin also to inform the affected State of any unilateral measures of prevention it intended to take, which was a sort of first step towards a legal régime to regulate the activity in question. If no reply to the notification was received within six months (art. 13), the proposed preventive measures would be deemed acceptable.

28. Draft article 11 dealt with the procedure for protecting national security interests or industrial secrets. Provision had to be made for cases in which transmitting all its information to the affected State would create a situation detrimental to the State of origin. There was a balance of interests involved. It did not seem fair to compel a State to divulge to its competitors industrial processes which might have cost a great deal to acquire; moreover, national security might dictate that some information should be withheld. How far should legal protection be afforded to such interests? Only up to the point at which defending those interests would harm third States. If it did, the balance must be restored. Moreover, the duty of the State of origin to provide the affected State with any information not touching upon those interests must be maintained. Where harm was presumably attributable to an activity but the causes were difficult to trace owing to lack of information, the affected State should be allowed to draw on presumptions and circumstantial evidence to show that the harm was indeed caused by the activity in question. As he pointed out in his report (A/CN.4/423, para. 105), in the *Corfu Channel* case the affected State had been allowed to use such procedural devices to demonstrate that the State of origin had known what was taking place in its territory. He hoped members would give their views on the advisability of making some express provision along those lines.

29. Draft article 12 contained provisions to complement those of draft article 10. A State might have failed to realize that an activity harmful to it was being carried on in another State. Moreover, the State of origin might have underestimated the potential effects of the activity. If a State became aware that the effects might prove harmful, it had the right to alert the State of origin on the basis of a detailed technical explanation. Consequently, under article 12, the affected State could request the State of origin to comply with its obligations under article 10.

30. Draft articles 13 to 17 completed the procedural steps following notification. Two important questions arose. First, should the State of origin postpone starting an activity until satisfactory agreement had been reached with the affected State or States? Secondly, what about activities which had already been carried on for some time, such as the production of certain types of industrial wastes, the use of certain fertilizers in agriculture, emissions from car and lorry exhausts, or the use of domestic heating materials—activities which had harmful effects but had previously been tolerated?

31. On the first question, he had opted for the non-postponement of the activity. That solution was the opposite of the one adopted in the draft articles on the law of the non-navigational uses of international watercourses. But the range of activities involving watercourses was not infinite, and such activities were well defined. A riparian State could accept certain restrictions without undue impairment to its freedom of action on its own territory. By contrast, the activities covered by the present topic were changing and complex, with transboundary effects that could extend to the population of the State of origin. Accordingly, the proposed articles represented an interim régime under which the State of origin could begin or continue the activity without waiting for the consent of the affected State, but must immediately assume responsibility for any harm it might cause. If the activity proved to be dangerous or to have harmful effects, the articles provided a protective net, namely compensation for any harm if, on investigation, a causal link was established between the harm and the activity.

32. On the second question—existing harmful activities—he attributed the measure of tolerance they enjoyed to the fact that all States were affected and to the difficulty of ascertaining the precise origin of cumulative harm. Yet most such activities were regularly reviewed and were the subject of international negotiations to mitigate and ultimately remove their harmful effects. In the mean time, the draft articles offered a transitional solution by stipulating the duty to negotiate an appropriate régime for harmful activities and to negotiate reparation for harm caused. Later, the Commission might decide to amend the procedure in order to cover habitual existing activities. The negotiations must take due account of the special situation of the developing countries, which had so far contributed least to the harmful activities but had suffered most from their consequences.

33. Draft articles 13, 14 and 15 dealt with notifications and replies to notifications. Article 13 was based, *mutatis mutandis*, on articles 13 and 14 of the draft articles on the law of the non-navigational uses of international watercourses provisionally adopted by the Commission at its previous session.[11] He had stipulated a time-limit of six months for replies so as to afford both notifying and notified States the advantage of certainty. The expression "Unless otherwise agreed" meant that States were free, in each case, to decide on an alternative time-limit. Under draft article 13, the State of origin was bound to respond to a request by the notified State for any information it possessed on the new activity, and to supplement it with any other "available" information necessary for evaluating the effects of the activity.

34. Draft article 14 concerned the notified State's reply, especially its obligation to communicate to the notifying

[9] United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905, at p. 1965 (decision of 11 March 1941).

[10] Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4, at p. 22.

[11] For the texts and the commentaries thereto, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 49-50.

State any findings of its own, and its acceptance or rejection of the preventive measures or legal régime proposed by the State of origin. Under draft article 15, silence on any of those points implied acceptance.

35. Draft article 16 provided that, if the two parties failed to agree, they were bound to negotiate a solution. The inclusion in the draft of the obligation to negotiate in such an event was merely a codification of the existing international law in the matter. The obligation was applicable to any situation where there was a clash of interests, and especially so where injurious consequences arose out of acts not prohibited by international law. In the *Fisheries Jurisdiction* cases, the ICJ had found that the rights of the parties were limited by their obligation to take account of the rights of other States, and accordingly that "the obligation to negotiate . . . flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case".[12] The principle thus stated was directly applicable to the situations covered by the new draft articles. The obligation to negotiate stemmed from the very nature of the respective rights of the parties on the basis of their territorial sovereignty: the right of the State of origin freely to use its own territory, and the right of the affected State to use and enjoy its territory without impairment. In the past, transboundary harm had been a rare occurrence, and regulation unnecessary. It was when scientific progress ushered in techniques with the potential to cause transboundary harm that a situation of interdependence arose, resulting in the need for certain restrictions on the rights of all States, whether for the sake of conservation or for other reasons.

36. With regard to paragraph 2 of article 16, he suggested that the limits of the obligation to negotiate lay in good faith and reasonableness. The duty to negotiate could arise only where the conflicting interests to be reconciled were essentially reasonable. Disagreement might arise between the State of origin and the affected State about the nature of the activity or its effects, or about the measures proposed for the legal régime to govern it. In the first case, paragraph 1 offered the alternatives of consultations between the parties in order to ascertain the facts, or the agreed establishment of fact-finding machinery with advisory functions. The latter solution had been suggested by the previous Special Rapporteur in the schematic outline (sect. 2 (6)). However, there was no alternative to negotiations where the disagreement related to the legal régime to govern the activity. That second procedural step was largely dependent on the outcome of the first. For that reason, fact-finding machinery was preferable.

37. Draft article 17 covered the situation in which a State notified under article 12 failed to reply within six months. It would then be deemed to have accepted the presumed affected State's characterization of the activity, and the activity would accordingly be subject to the régime laid down in the draft articles.

38. He looked to members of the Commission for guidance on the various points covered by the draft.

39. The CHAIRMAN suggested that some corrections were required to the Special Rapporteur's fifth report (A/CN.4/423). As the Special Rapporteur had indicated, a corrigendum would be issued shortly. In paragraph 50 (*d*), for example, the words "the act would not have to cease" should read "the activity would not have to cease".

40. Mr. CALERO RODRIGUES said that the original Spanish text of the report and the French translation were preferable to the English version in several places, notably in draft article 2 (*d*).

41. Mr. KOROMA was critical of the wording of draft article 1. He invited the Special Rapporteur to look into the English text of the draft articles and to issue a corrigendum, for the benefit of members who relied on that version.

42. Mr. REUTER said that, since the texts proposed by the Special Rapporteur included revised articles 1 to 9 to replace articles 1 to 10 already before the Drafting Committee, it might be better for the Commission to proceed with the new draft articles 10 to 17 only. Otherwise, it might simply repeat arguments which had been rehearsed before.

43. Mr. BARBOZA (Special Rapporteur) said that he would welcome comments on all the new draft articles, but would not object to the discussion beginning with articles 10 to 17.

44. Mr. THIAM said he thought that the revised draft articles 1 to 9 should be submitted to the Drafting Committee rather than to the Commission in plenary.

45. The CHAIRMAN suggested that it would be valuable for the Drafting Committee to learn the views of members of the Commission on the revised articles 1 to 9. Members should therefore be free to comment on those texts.

46. Mr. BARSEGOV said he felt that, where major conceptual alterations had been made to a set of draft articles already before the Drafting Committee, it would be a mistake for the Commission to proceed without itself discussing the changes.

47. Mr. BEESLEY said that he agreed with Mr. Barsegov. When dealing with the draft Code of Crimes against the Peace and Security of Mankind, the Commission had originally had before it a set of draft articles containing a list of crimes, which was subsequently removed and replaced by another. Such changes being of a conceptual nature, members should be free to express their views on the earlier draft articles together with the new ones.

48. The CHAIRMAN suggested that the discussion should begin by focusing on the new draft articles 10 to 17, but should not exclude comments on the revised articles 1 to 9.

It was so agreed.

The meeting rose at 11.25 a.m.

[12] *Fisheries Jurisdiction (United Kingdom* v. *Iceland) (Federal Republic of Germany* v. *Iceland), Merits*, Judgments of 25 July 1974, *I.C.J. Reports 1974*, pp. 3 and 175, at p. 32, para. 75, and p. 201, para. 67.

2109th MEETING

Wednesday, 31 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

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

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

[Agenda item 1]

1. The CHAIRMAN said that the Enlarged Bureau recommended that the resumed discussion on State responsibility should take place on 20 and 21 June and that consideration of the topic of the law of the non-navigational uses of international watercourses should start on 22 June and end on 28 June. The Enlarged Bureau had been informed by the Chairman of the Drafting Committee that the Committee intended to conclude its substantive work on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier on about 8 June and to make the final adjustments to the texts on 15 June. The Commission could then take up the Drafting Committee's report on that topic on 29 June, as originally planned.

2. Mr. EIRIKSSON recalled that he had already expressed some reservations about the period following the consideration of the first two topics in the Commission's provisional plan of work and that the decision taken at the beginning of the session (2095th meeting, paras. 21-22) had been based on *force majeure*, namely the lack of certain documents. Also, the Planning Group had requested that more time should be made available to the Drafting Committee and that, if necessary, the time allocated for the consideration of certain topics should be curtailed. He therefore trusted that the decision to be adopted now would take into account possible changes in the timetable.

3. The CHAIRMAN said that the Commission would, of course, allow the Drafting Committee as much time as possible for its work and would, in any event, revert to the matter later. If there were no objections, he would take it that the Commission agreed to adopt the recommendations of the Enlarged Bureau.

It was so agreed.

* Resumed from the 2104th meeting.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,[1] A/CN.4/413,[2] A/CN.4/423,[3] A/CN.4/L.431, sect. B)[4]

[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 17[5] (*continued*)

4. Mr. BARBOZA (Special Rapporteur) referred to certain corrections to be made to his fifth report (A/CN.4/423), including some suggested by members at the previous meeting.

5. In response to a point raised by the Chairman (2108th meeting, para. 39), however, he said that he would prefer to retain the word "act" in the last sentence of paragraph 49, since it was the act that must cease, while the activity would go on. In that connection, he cited the example of a chemical plant which made a certain product using a substance that caused transboundary harm. In such a situation, it was not the activity itself that would be at issue, but the continued use of the substance in question. Alternatively, the obligation of prevention was established as an obligation of result and transboundary harm was then the consequence of a wrongful act because the result had not been achieved; or, again, the obligation of prevention was imposed as an obligation of conduct and it was the actual use of the substance in question that was prohibited. In either case, it was the use of the substance—in other words the "act"—which was wrongful, either because the result had not been achieved or because the act was directly prohibited. The act, but not necessarily the activity, must therefore cease.

6. The CHAIRMAN said that his comment had related not to paragraph 49 of the report, but to paragraph 50, and specifically to point (*d*), which stated that "the act would not have to cease". Would it not be better to say "the activity would not have to cease"?

7. Mr. BARBOZA (Special Rapporteur) said that, in that particular case, it was correct to say "the act would not have to cease", because, in a system of strict liability, the act was not prohibited. The act could continue; it was its effects for which there must be reparation.

8. Mr. McCAFFREY said that his comments would pertain to the introduction to the fifth report (A/CN.4/423), to the revised draft articles 1 to 9 and to the new material and draft articles relating to procedural obligations.

9. With regard to the Special Rapporteur's reference to "original fault" or "original sin" (*ibid.*, para. 5), he did not

[1] Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

[5] For the texts, see 2108th meeting, para. 1.

think it was possible to say, without distorting the concept of fault, that fault existed in theory from the moment when an activity involving risk was undertaken. In his view, the operator received permission from society to start an activity involving risk even though the activity entailed a risk that could not reasonably be avoided and it was only if the activity caused any harm that the operator must, even in the absence of fault on his part, compensate the injured parties, at least up to a certain level.

10. He shared the view recalled in the report (*ibid.*, para. 12) that it would be better to refer, as in the French title of the topic, to "activities" rather than to "acts", since it was the activity that was not prohibited. He had in mind in particular the activity of a nuclear plant or of a chemical factory. The Special Rapporteur had just given an example of an act likely to cause harm, but it sometimes happened that an incident occurred—that risk materialized in injury—even if there was no human intervention.

11. The legal situation was therefore that the topic fell somewhere between *force majeure* and an internationally wrongful act and one of the pre-conditions for the operation of such an activity involving risk, both at the national level and at the international level, was the obligation to pay appropriate compensation to those who were injured as a result. There was also the possibility of such an activity causing harm through the fault of the operator, for instance if he failed to maintain his plant properly. At the international level, the State of origin would then be held responsible, at least if all the pre-conditions set forth in part 1 of the draft articles on State responsibility[6] were met. He therefore welcomed the Special Rapporteur's conclusions (*ibid.*, paras. 14-15) to the effect that the topic was concerned with ongoing activities and not with isolated acts. It was preferable for the Commission to concentrate on activities that could give rise to appreciable transboundary harm of a physical nature, either because of an accident or due to continuing pollution. In that connection, the Special Rapporteur had rightly included continuing pollution within the scope of the draft, in response to the views expressed by a number of members at the previous session and even though extending the scope to pollution did give rise to other problems. He also agreed with the Special Rapporteur that:

> ... For their continuation, such activities require that agreement be reached on a régime establishing, between States of origin and affected States, obligations and guarantees designed to strike a balance between the interests at stake. ... (*Ibid.*, para. 15.)

12. Turning to the revised draft articles 1 to 9 of chapter I (General provisions) and chapter II (Principles) of the draft, he said that he had redrafted some of them in order to make their meaning clearer. The reformulations he would read out were not, strictly speaking, proposals on his part, but simply possible ways of expressing the basic ideas more clearly.

13. He was not satisfied with the use in draft article 1 of the words "territory", "jurisdiction", "control" and "places" or with the expression "throughout the process". The article might be amended to read:

> "The present articles apply to activities which are carried on under the jurisdiction or effective control of a State and whose operation gives rise to transboundary harm or entails an appreciable risk thereof."

Since some of the terms used in that text were defined later in the draft, there was no need to give a definition of them at the outset. The word "effective" should be retained for the reasons put forward at the previous session, particularly by Mr. Razafindralambo,[7] which related mainly to the situation of the developing countries.

14. In draft article 2, on the use of terms, it would be enough to use something close to the dictionary definition of the term "risk", for example:

> "'Risk' means the possibility of appreciable harm which cannot be eliminated by any reasonable precautions that might be taken in respect of an activity."

That definition could be supplemented by a subparagraph specifying that "appreciable risk" meant "risk that is [not difficult to discover] [discoverable upon a reasonable examination] and therefore is or should be known" and that it included both the low probability of serious harm and the high probability of minor appreciable harm. The word "simple", used by the Special Rapporteur in subparagraph (*a*) (ii), was unusual in legal parlance and should be replaced by one of the two expressions he had proposed. In the commentary, the Commission might include, by way of explanation, the phrase "simple examination of the activity and the things involved, in relation to the place, environment or way in which they are used" from the text proposed by the Special Rapporteur. It could also indicate that "serious" meant "very considerable", "disastrous" or "catastrophic".

15. Subparagraph (*b*) might read:

> "'Activity involving risk' means an activity whose operation entails appreciable risk."

If a definition of "activities with harmful effects" was required, the following text could be added to subparagraph (*b*):

> "'Activity with harmful effects' means an activity whose operation results in continuing transboundary harm."

There would be no need to add the adjective "appreciable" because the definition of "transboundary harm" in subparagraph (*c*) could read:

> "'Transboundary harm' means appreciable physical harm in [places] [areas] under the jurisdiction or effective control of a State which results from an activity of the kind referred to in article 1 carried on in another State."

It might be added that:

> " . . . The expression includes physical harm to persons or objects, to the use or enjoyment of areas or to the environment."

16. Subparagraph (*d*) could be amended to read:

> "'State of origin' means the State exercising jurisdiction or effective control over an activity [whose operation gives rise to transboundary harm or entails an appreciable risk of transboundary harm within the meaning of article 1]."

[6] See 2108th meeting, footnote 8.

[7] *Yearbook . . . 1988*, vol. I, pp. 36-37, 2048th meeting, para. 42.

Subparagraph (*e*) could be replaced by the following text:

"'Affected State' means the State within whose territory or under whose jurisdiction or effective control transboundary harm occurs or may occur."

17. With regard to draft article 3, he agreed with the change in the title, where the word "attribution" had been replaced by "assignment", which did not have the same connection with the field of State responsibility. He also had some suggestions on the wording of that provision and on that of draft articles 4 to 9, but they were not as detailed as in the case of articles 1 and 2 and he would therefore make them in the Drafting Committee.

18. Concerning draft article 8, he would only stress that the commentary must carefully explain restrictive expressions such as "in so far as they are able" and "the best practicable, available means", because the explanations the Special Rapporteur had given orally were not contained in the relevant passage of his report (*ibid.*, paras. 65-66).

19. As to draft article 9, he said he was afraid that the term "reparation" might lead to confusion between the topic under consideration and the draft articles on State responsibility. Another term would have to be found in order to indicate that the consequences of activities which were not prohibited by international law could be different from those of a breach of an international obligation. Perhaps article 9 could simply state that " . . . the State of origin shall be liable for appreciable harm" and that "the nature and extent of such liability shall be determined by negotiation between the State of origin and the affected State . . . ". The term "liability", taken from the title of the topic, would then be defined either in article 2 or in the commentary.

20. Turning to the Special Rapporteur's comments on the revised draft articles 1 to 9, he reiterated his view that it would be desirable, in the interests of the developing countries, to reintroduce the concept of "effective" control in article 1.

21. With regard to draft article 5, he generally endorsed the Special Rapporteur's comments (*ibid.*, paras. 40-44) concerning the relationship between the draft articles under consideration and those on the law of the non-navigational uses of international watercourses. As he had explained at the previous session, however, his interpretation of article 23 (Breach of an international obligation to prevent a given event) of part 1 of the draft articles on State responsibility was somewhat different from that of the Special Rapporteur.[8] It was clear to him that a régime of strict liability could coexist with one based on "fault", or failure to exercise due care, but everything depended on the primary rule involved and specifically on whether that rule said that "State A shall exercise due diligence to prevent harm to State B" or that "State A shall ensure that no harm is caused to State B". That was a crucial point because it was quite common for the exact meaning of the primary rule not to be perfectly clear. The Special Rapporteur considered (*ibid.*, paras. 45-46) that the obligation under the draft articles on international watercourses belonged to the first category and that the obligation referred to in the draft articles under consideration belonged to the second category. In that connection, it should be noted that the Special Rapporteur introduced the interesting idea (*ibid.*, para. 46) of the reduction of the amount of compensation payable under a régime of strict liability, the amount being determined through negotiation. However, he could not share the view that "in normal cases of pollution . . . the defence of 'due diligence' is virtually unthinkable" (*ibid.*, para. 47). To begin with, the concept of "due diligence" was a flexible one that might well be appropriately invoked by the developing countries, which did not always have the necessary means to exercise the same degree of diligence as the industrialized countries. It was, moreover, quite common in the event of the pollution of an international watercourse, and probably even more so in the case of air pollution, for the State of origin not to know that a particular activity was causing transboundary harm or that such harm had occurred. Lastly, as he had pointed out in paragraph (11) of his comments on draft article 16 [17] on pollution as submitted in his fourth report on international watercourses,[9] the concept of due diligence was broad enough to take account of the common practice in many countries with heavily polluted international watercourses of allowing the State of origin a reasonable period of time to reduce the pollution to an acceptable level, provided that it made its best efforts to do so.

22. He could nevertheless agree with the Special Rapporteur's analysis of hypotheses (*a*) and (*b*) as referred to in the report (*ibid.*). It was obvious that the issue at stake was whether the draft articles under consideration should provide for a régime of strict liability for the State of origin in which harm resulted not from an "activity involving risk", but from continuing pollution. That seemed to be the conclusion which followed from hypothesis (*b*). To the best of his knowledge, that was the first time it had been proposed that such a régime should be established under the present topic. He was not sure that it was such a bad idea, however, since the result would simply be that the States concerned would have to negotiate on the nature and extent of liability. That was what happened in State practice in any event, as the Special Rapporteur explained in his report. For all those reasons, he agreed with the Special Rapporteur (*ibid.*, para. 49) that wrongful "acts" had their place in a set of draft articles on liability for the injurious consequences of "activities" which were not prohibited by international law. In that connection, he agreed with the Chairman (see para. 6 above) that the word "act" in paragraph 50 (*d*) of the report should be replaced by "activity".

23. He found paragraph 52 of the report somewhat puzzling, since he had always thought that an obligation of due diligence was an obligation of conduct. He would therefore welcome a clarification by the Special Rapporteur of that point.

24. Turning to the Special Rapporteur's comments on draft article 7, he welcomed the reference (A/CN.4/423, para. 62) to the possibility that, in certain cases and under certain conditions, the affected State might have to use all possible means to assist the State of origin to mitigate the harmful effects of an activity. That was also consistent with

[8] *Ibid.*, pp. 9-11, 2044th meeting, paras. 47-49, and 2045th meeting, paras. 1-4.

[9] *Yearbook . . . 1988*, vol. II (Part One), pp. 240-241, document A/CN.4/412 and Add.1 and 2.

State practice, at least with respect to international watercourses, and it was that idea which was inherent in the concepts of equitable utilization and participation embodied in article 6 of the draft articles on the law of the non-navigational uses of international watercourses provisionally adopted by the Commission at its thirty-ninth session.[10]

25. With regard to the Special Rapporteur's comments on draft article 9, he said that, as he had already stated, he had doubts about the appropriateness of the term "reparation" in the present topic. He wished to stress that, if the obligation of the State of origin lay in restoring the "balance of interests" between the States concerned, it seemed crucial to have a clear understanding of what that expression meant. The Special Rapporteur rightly stated (*ibid.*, para. 71) that it did not mean reparation for *all* the injury suffered. But some additional guidance would be required with regard to the measures that must be taken to satisfy that obligation in order not to prejudice the primacy of the law and the legal protection of the weaker party.

26. Referring to chapter III of the draft (Notification, information and warning by the affected State), he noted that the new draft articles 10 to 17 on procedural rules submitted by the Special Rapporteur were based on the provisions of part III of the draft articles on the law of the non-navigational uses of international watercourses provisionally adopted by the Commission at its previous session.[11] Although the procedures proposed by the Special Rapporteur would undoubtedly work in many of the situations to be covered, it was not clear whether they would be suitable in all cases. For example, those provisions could be applied without much difficulty to transboundary water pollution and in some localized cases of transboundary air pollution, but not in cases of less localized transboundary air pollution, long-distance air pollution (acid rain), massive deforestation (leading to an increase in the amount of carbon dioxide in the Earth's atmosphere) or a major nuclear accident, or indeed in the case of harm to the "global commons" (such as the current oil spill in Antarctica). The fact was that, while the relationships between watercourse States could easily be seen as bilateral relationships for the purposes of procedural rules, that was not always the case in the topic under consideration. In other words, the draft articles must contain provisions specifically indicating that notification, or negotiation, should be effected in certain cases through a clearing-house or an international organization. In that connection, it was to be noted that the Executive Body established under the 1979 Convention on Long-range Transboundary Air Pollution[12] had, *inter alia*, that function (art. 8). Admittedly, draft article 7 required that States should request the assistance of international organizations in some cases, but that provision should be supplemented by provisions in chapter III of the draft setting out the specific circumstances in which States might—or would be required to—have recourse to international organizations in fulfilling their obligations of assessment, notification and negotiation.

27. Noting that the title of chapter III and of draft article 12 referred to a "warning" by the presumed affected State, he pointed out that it was usually the State of origin which would be issuing the "warning". That might simply be a problem of translation, but it would perhaps be more appropriate to use a formula such as: "Request for information by the potentially affected State".

28. He welcomed the fact that the Special Rapporteur had introduced an obligation of impact assessment and fact-finding. As pointed out in the report (*ibid.*, paras. 80-83), there was considerable international practice in that regard. In addition to the examples given by the Special Rapporteur, however, account should be taken of the work of OECD and of the draft Framework Agreement on Environmental Impact Assessment in a Transboundary Context, which was being prepared by the Economic Commission for Europe. The latter instrument was particularly instructive in that it used and defined many of the terms—or their equivalents—used in the articles proposed by the Special Rapporteur and in that the procedures established were similar to those laid down in the draft articles on international watercourses. It was also to be noted that, in the ECE draft, the basic obligation was that the parties should, either individually or jointly and by all appropriate and effective means, take preventive measures to avoid, reduce and control any significant adverse transboundary environmental impact from planned activities.

29. In conclusion, he commended the Special Rapporteur for having outlined the approach to be followed in achieving the purpose of the draft articles under consideration, namely to meet the concern to prevent pollution and protect the environment, particularly with regard to the harm which could occur in the "global commons" of mankind.

30. Mr. HAYES congratulated the Special Rapporteur on his brilliant analysis of highly complex problems and on his success in arriving in his fifth report (A/CN.4/423) at specific provisions reflecting the views expressed in the Commission and in the Sixth Committee of the General Assembly. For the time being, he would confine his remarks to chapters I and II of the draft articles and would speak at a later stage on chapter III.

31. Recalling that he had said at the previous session[13] that the role then assigned to the "risk" factor in the draft articles was too limitative and liable to hamper the implementation of one of the three principles endorsed by the Commission, namely that "an innocent victim of transboundary injurious effects should not be left to bear his loss", he said he was pleased to note that the Special Rapporteur now agreed that that role should be more circumscribed and that liability could arise either from risk or from harm. In addition, he agreed with the Special Rapporteur that it was "activities" rather than "acts" which formed the subject-matter of the draft articles under consideration, including activities giving rise to harm through cumulative effect. He therefore endorsed the Special Rapporteur's conclusions (*ibid.*, para. 15) concerning the consequences which followed from liability under the draft articles and led into the part dealing with prevention and reparation.

[10] For the text and the commentary thereto, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 31 *et seq.*

[11] For the texts of articles 11 to 21 of part III (Planned measures) and the commentaries thereto, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 45 *et seq.*

[12] E/ECE/1010; to be published in United Nations, *Treaty Series*, No. 21823.

[13] *Yearbook . . . 1988*, vol. I, pp. 207-208, 2074th meeting, paras. 3-4.

32. Turning to the revised draft articles 1 to 9 submitted by the Special Rapporteur, he welcomed the substantive changes in article 1 (Scope of the present articles), which provided that liability could arise from harm as well as from risk and thus formed the basis for the two remedies of prevention and reparation. In response to the Special Rapporteur's invitation of views on the matter (*ibid.*, para. 25), he said that he was in favour of retaining the word "appreciable" as the adjective to qualify the word "risk". The proposed alternatives would convey the idea of higher thresholds, and he agreed with the Special Rapporteur that that would be undesirable. The Drafting Committee should address the problem that the expression "throughout the process" did not seem, either in its placing or in its wording, at least in English, to correspond to the underlying idea (*ibid.*, para. 22) that risk should be covered by the draft articles whether its effect was one-off, continuous or cumulative.

33. Any work done now on draft article 2 (Use of terms) should be provisional. When the first reading had been completed, it might be found that some of the terms contained in the article would no longer need to be defined, while others would. He nevertheless welcomed the change in emphasis in the two definitions in subparagraph (*a*) and was in favour of retaining the words "very considerable" rather than the word "disastrous" in the definition of "appreciable risk". The Drafting Committee might consider the following questions: Should "activities" be part of the definition of "risk"? Where should the words "notwithstanding any precautions which might be taken in their regard" be placed in subparagraph (*a*) (i)?

34. He welcomed the direct reference to the environment in subparagraph (*c*), but wondered whether that subparagraph would not need adjustment if the Commission decided, as he hoped it would, that the draft articles should cover harm to "the commons" of mankind. For practical reasons, he thought that it was necessary to retain the word "control" to facilitate the protection of the population in areas where legitimate jurisdiction had been displaced.

35. With regard to subparagraph (*d*), he preferred the expression "source State" to "State of origin". He welcomed the amended text of that subparagraph suggested by Mr. McCaffrey (para. 16 above), but wondered whether the text should not be further simplified to read:

> "(*d*) 'State of origin' means the State under whose jurisdiction or control the activities referred to in article 1 take place."

He also welcomed the revised text of subparagraph (*e*) proposed by the Special Rapporteur and its explicit reference to the environment.

36. He was not satisfied with the title of draft article 3 (Assignment of obligations), at least in English, and thought that a more accurate translation of the original Spanish text might solve the problem. Otherwise, he thought that the article was an improvement on the previous text and he was especially pleased that the article itself expressly provided that the burden of proof of lack of knowledge or means of knowing fell on the source State.

37. He preferred alternative B of draft article 5 (Absence of effect upon other rules of international law). As for draft article 6 (Freedom of action and the limits thereto), he noted that, in accordance with the hope he had expressed, it had been redrafted in order to reflect more closely Principle 21 of the Stockholm Declaration.[14]

38. He welcomed the fact that, in draft article 7 (Co-operation) prevention and reparation had been dealt with separately; that was a logical consequence of the wording of article 1. He was not certain, however, whether the obligation to co-operate with international organizations should be absolutely binding, for in some cases that might not be wholly desirable. He also wondered why the occurrence of an accident should be a factor in the requirement for the affected State to co-operate to minimize the effects in the territory of the source State.

39. He noted with satisfaction that the previous draft article 8 (Participation)[15] had disappeared from chapter II of the draft; its substance could be appropriately included elsewhere. As for the present draft article 8 (Prevention), it properly placed the responsibility for prevention on the source State, regardless of the duty of co-operation set out in article 7. He was not sure, however, that the second sentence of article 8 was an improvement on the expression "reasonable preventive measures" used in the previous draft article 9.

40. He was disappointed that draft article 9 (Reparation) did not refer to the innocent victim of transboundary harm. He recalled that, at the end of the Commission's discussion of the topic at its thirty-ninth session, the Special Rapporteur had identified three general principles which should apply in the area:

> (i) Every State must have the maximum freedom of action within its territory compatible with respect for the sovereignty of other States;
>
> (ii) States must respect the sovereignty and equality of other States;
>
> (iii) An innocent victim of transboundary injurious effects should not be left to bear his loss.[16]

He had expected that those three principles would be reflected in chapter II of the draft (Principles), but only the first two were reflected in draft article 6. The third should be reflected in draft article 9. He also thought that the words "bearing in mind in particular that reparation should seek to restore the balance of interests affected by the harm" at the end of article 9 related more to the criteria governing negotiations on reparation and that they should therefore not be included in that provision. At the previous session,[17] he had indicated what he thought should be the content of the article (then draft article 10) and he now suggested that it be amended to read:

> "Where transboundary harm results from an activity as referred to in article 1, reparation shall be made by the source State. The nature and the extent of the reparation shall be determined by negotiation between the source State and the affected State or States, in accordance with the criteria set forth in these articles and in the light of the requirement that the innocent victim of transboundary harm should not be left to bear the loss."

He was aware that part of the Special Rapporteur's reason for deleting the reference to the innocent victim was that it

[14] See 2108th meeting, footnote 6.

[15] *Ibid.*, footnote 5.

[16] *Yearbook . . . 1987*, vol. II (Part Two), p. 49, para. 194 (*d*).

[17] *Yearbook . . . 1988*, vol. I, p. 208, 2074th meeting, para. 14.

had been misunderstood in the previous draft article 10. In his own view, however, the principle was important enough to be given its rightful place, in some clear form, in the draft articles.

41. In reply to a question by Mr. BEESLEY, the CHAIRMAN said that the secretariat would issue working papers containing the specific drafting proposals which had been made on the topic.

The meeting rose at 11.15 a.m.

2110th MEETING

Thursday, 1 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

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

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,[1] A/CN.4/413,[2] A/CN.4/423,[3] (A/CN.4/L.431, sect. B)[4]

[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 17[5] (*continued*)

1. Mr. SHI thanked the Special Rapporteur for his concise and well-documented fifth report (A/CN.4/423) and commended him on the submission of 17 draft articles, the first nine being revisions of the 10 articles referred to the Drafting Committee at the previous session.[6]

2. In draft article 1, the Special Rapporteur had extended somewhat the scope of the articles to include activities causing appreciable transboundary harm. It was a compromise formula, adopted to take account of the divergent views expressed in the Commission and in the Sixth Committee of the General Assembly. As he had stated at the previous session,[7] risk as a basis of liability could exclude activities which, though not involving risk, could cause harm of great magnitude. He agreed with the Special Rapporteur that there should be a limit to liability under the draft articles and that absolute liability should not be incurred. In that connection, the Special Rapporteur had rightly drawn a distinction between activities and acts: liability should be linked to the nature of the activity, and acts, if they were to be covered by the draft, must be linked to an activity involving risk or having harmful effects and must not be isolated and unconnected with any activity.

3. Draft article 7 circumscribed in specific terms the area in which the duty of co-operation arose, namely the prevention and control of harmful effects. The article should, however, like the corresponding provision in the draft articles on the law of the non-navigational uses of international watercourses, also state the fundamental principles of international law upon which co-operation between States of origin and affected States rested. It was gratifying to note that the previous draft article 8, on participation, had been dropped, since participation was implicit in the article on co-operation and the wording of the earlier article had been vague and open to misunderstanding.

4. Under the present draft article 8, which was a revised version of the previous draft article 9, a breach of the duty of prevention was made contingent upon use of the best practicable, available means. He maintained the view he had expressed at the previous session[8] that failure to take preventive measures did not in itself give rise to liability or to a right of action. Only if such failure resulted in harm, or if harmful effects occurred in spite of the measures taken, could liability be ascribed to the State of origin. The basic issue concerned the kind of legal régime to which the draft would apply. Although the Special Rapporteur believed (*ibid.*, para. 42) that, in the absence of harmful effects, no one would verify whether the means used to prevent such effects were adequate or not, the affected State could, under article 7 on co-operation and under the subsequent articles on notification, demand inspection and verification of preventive measures. If the affected State then found that the preventive measures adopted by the State of origin were not the best practicable and available means to prevent or minimize the risk of transboundary harm, would that failure on the part of the State of origin constitute a wrongful act giving rise to State responsibility? That was a point of some importance and, in that regard, article 8 was vaguely worded.

5. The revised articles were no doubt an improvement and any drafting problems could, of course, be ironed out in the Drafting Committee. He agreed with Mr. Hayes (2109th meeting) that draft article 2, on the use of terms, should be provisional, and that it should be revised thoroughly upon completion of the first reading of the draft.

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[1] Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

[5] For the texts, see 2108th meeting, para. 1.

[6] See 2108th meeting, footnote 5.

[7] *Yearbook . . . 1988*, vol. I, p. 26, 2047th meeting, para. 27.

[8] *Ibid.*, pp. 26-27, para. 31.

6. The new draft articles 10 to 17 of chapter III of the draft embodied procedural rules on notification and the follow-up steps. For the most part, they drew on the comparable provisions of the draft articles on the law of the non-navigational uses of international watercourses. He wondered, however, to what extent the two topics should have the same kind of procedural rules. For example, as pointed out by Mr. McCaffrey (*ibid.*), harm caused by activities involving risk was often long-range and it was difficult to assess in advance which States would be affected. In such cases, which State or States should be notified by the State of origin? Mr. McCaffrey had also suggested that some kind of international clearing-house should be introduced—a suggestion with which he himself was unable to agree or disagree at the present stage. One view expressed in the Sixth Committee had been that, under any future convention, a systematic obligation to consult all the States potentially affected should not be imposed on States intending to engage in a new activity, since that would be tantamount to providing a right of veto over their activities. There were other dissimilarities between the two topics, some of which the Special Rapporteur noted in his report (A/CN.4/423, para. 111). A simple analogy between the two topics might therefore not be adequate to provide the basis for the rules in chapter III of the draft. It was a complicated problem and one that merited much thought.

7. Mr. REUTER said that the Special Rapporteur's work on the topic was marked by two qualities. First, even though from the outset some members of the Commission had denied the very existence of the topic, the Special Rapporteur had not allowed himself to be assailed by doubts but had believed in his subject. He, too, believed in the topic, particularly since reading the new draft articles 10 *et seq.* In such a complex topic, the Commission would be well advised to proceed in two directions, asking itself which were the substantive rules it wished to lay down and which procedures it wished to establish. While he agreed entirely that the substantive aspect must be dealt with first, the topic as a whole would be seen in a harsher yet clearer light when it came to laying down the procedural rules.

8. A second quality was the Special Rapporteur's genuine and disinterested desire to do justice to the views of all members of the Commission. In so doing, he necessarily had to deal with the topic at some length, referring in his comments and explanations to the particular positions held by some members.

9. With regard to the fifth report (A/CN.4/423) in general, and as Mr. Ushakov, a well-remembered former member of the Commission, had been wont to say: "What's it all about?" The answer was: transboundary situations which initially involved no element of wrongfulness. In that connection he would pose the question, without seeking to resolve it, whether multilateral transboundary situations, as opposed to a straightforward bilateral situation, were covered by the draft. That, of course, raised the question of procedure, but he wondered whether it did not also raise one of substance. He had in mind in particular long-range air pollution and the 1979 Convention on Long-range Transboundary Air Pollution.[9] He was not certain that it was possible in such cases to talk of the same mechanisms and rules.

10. The Commission was in fact riding two horses at the same time, for it was dealing simultaneously with the topic of the law of the non-navigational uses of international watercourses and with the general question of transboundary harm. In that respect, he was not certain whether the articles which the Special Rapporteur had just revised and which dealt with their relationship with existing conventions were sufficient. One possibility might be to allow States affected by a transboundary situation which was covered by the articles on international watercourses the choice of invoking the régime provided for in the articles on the present topic. States in a bilateral relationship could be said to have such a choice, for a party to a treaty could not be prevented from invoking an agreed régime. In that regard, he noted that the Special Rapporteur had raised the problem of whether several régimes could be simultaneously applicable under a treaty, in which case a question of choice almost certainly arose. That, then, was one approach, although it was not entirely satisfactory.

11. Another approach was to apply the Latin maxim *specialia generalibus derogant* and, conversely, *specialia per generalibus non derogantur*, which meant that the purpose of the draft, in the form of a convention, would be to deal with the problem of transboundary situations in the most general terms possible. In other words, it would be what might be termed a residual convention: the substantive rules would be couched in very general terms to provide for minimal solutions, it being left to special conventions to go further. In that case, there would be no choice where the articles on international watercourses were concerned, for wherever such watercourses were involved those articles would apply. The same was true of all the other conventions, including the Convention on Long-range Transboundary Air Pollution. A guiding principle would thus be necessary and, if the Commission decided to adopt that position, he was ready to accept it.

12. One particularly important point was whether the Commission intended to lay down rules that remained faithful to the original situation, in which there was no wrongful act. However, he wondered whether it was possible to do so when laying down rules and, in particular, procedures. His own view, but one on which he would not insist, was that simply in drawing up articles 10 *et seq.* certain elements were introduced which perhaps did not strictly speaking relate to wrongfulness as such but were none the less essential, such as reparation. He would have preferred to use some other term, since reparation was linked to traditional State responsibility. In French, the word *compensations*, in the plural, denoted the ultimate outcome in the form of services or payment in cash or in kind of a situation in which harm had been caused. Unless he was mistaken, "compensation" in English, as opposed to "damages", denoted determination of a sum of money which was the equivalent of something that had disappeared. That was precisely the weak link in the whole analysis. Nor did it reflect the position of the Special Rapporteur in the excellent arguments adduced in his report (*ibid.*, paras. 70-71), which demonstrated that *restitutio in integrum* for the affected State was not possible.

13. The question of procedure was very important, but it was by no means certain that Governments would want to

[9] See 2109th meeting, footnote 12.

go as far as the Commission did. For example, draft article 10 (*d*) was too categorical in tone. Essentially, it was in the nature of a proposal, yet the article, referring to the State of origin, said "it shall", thus imposing an obligation from the outset. More diplomatic wording was required.

14. With regard to draft article 12, the positions of the potentially affected State and the State of origin should be symmetrical. Hence the procedure laid down in the article should entail more than just a warning. The potentially affected State should also have a right of initiative, perhaps of referral (*saisine*) for the purposes of enforcement.

15. The point to note in connection with draft article 16 was that there were several types of negotiation and that, for negotiations to take place at all, the parties must be willing to engage in them. An obligation to negotiate would be rendered sterile if positions were too rigid at the start. Clearly, it was very difficult to express an obligation to negotiate in an acceptable form. In the case of multilateral transboundary situations in particular, the Commission should, in any event, introduce the obligation to pursue a settlement under the auspices of an international organization: there would then be a much greater likelihood of a successful outcome to the negotiations. The draft might provide that each party could suggest that consultations take place in the context of an international organization, which could lend its good offices. The wording should not be too peremptory. Again, in the actual negotiations the parties must be required to provide grounds for their positions and proposals.

16. The end result should be a solution of *compensations* (in the sense in which he had already used the term), perhaps in the form of reciprocal assistance, which could well include money payments and probably some special régime. However, the Special Rapporteur proposed that the ultimate settlement must represent a balance of interests. For his own part, he thought it essential for any reference to "reparation" to be avoided and for the form of language to reflect the idea of a community of interests between the States concerned. It was equally important not to use the expression "innocent victim", since in fact both parties might be innocent.

17. Mr. BEESLEY congratulated the Special Rapporteur on the profound thinking evident in his fifth report (A/CN.4/423) and on the originality of his approach, which in part reflected the novelty of many of the concepts which came into play in the field of international liability. Of course, some of those concepts, such as the law of tort and nuisance, were more familiar in some legal systems than in others, a factor which was possibly the source of some of the difficulty in arriving at a generally acceptable text. It should be noted that the Commission's mandate was to develop international law within the parameters established by the terms of reference of the topic itself, which did not refer to "licit" or "illicit" acts but rather to "acts not prohibited by international law".

18. The fifth report represented a major effort to move on from the almost "theological" approach of the early stages of the work on the topic towards its more practical aspects by elaborating concrete articles. The Special Rapporteur had responded to the perceived need to make a specific reference to the environment as a proper subject for inclusion in the draft and to reflect the growing awareness of new conceptual approaches to the "global commons". A further issue addressed by the Special Rapporteur was the need to reflect two schools of thought within the Commission, namely the approach which took risk as the basis for liability, and the approach in which liability was based on harm. The Special Rapporteur had also accommodated the concern to avoid being unduly specific on such questions as the precise standards which might be applied in cases involving the environment, thus confining the draft articles to a global framework agreement, leaving precise standards for specific protocols or standard-setting agreements.

19. Commendably, the Special Rapporteur had not hesitated to borrow from other branches of law, including those relating to the non-navigational uses of international watercourses, State responsibility and the draft Code of Crimes against the Peace and Security of Mankind. It was gratifying to see the explicit recognition of the interrelationship between those topics, without which the progressive development of international law, as distinct from its codification, would be impossible. The Commission must be eclectic in seeking precedents for its work: accordingly, the Special Rapporteur had not hesitated to avail himself of the useful precedent of Principle 21 of the Stockholm Declaration,[10] which affirmed both the sovereignty and the interdependence of States. Another relevant instrument was the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,[11] as well as Part XII of the 1982 United Nations Convention on the Law of the Sea, which contained a whole section on marine pollution. However, the task of progressive development involved much more than simply citing precedents and filling lacunae, and its importance was not to be underestimated. Where precedents were lacking, both national law and State practice could be consulted, an approach adopted as far back as the *Trail Smelter* case.[12]

20. While the Special Rapporteur had not perhaps succeeded in laying to rest all of the long-standing controversies, he had certainly confronted them and raised the right questions, thereby giving the Commission an opportunity to resolve them. In that connection, he noted that the expressions "strict liability" and "absolute liability" seemed so far to have been used interchangeably, whereas his own understanding was that strict liability encompassed all the consequences that flowed from an act, while absolute liability meant liability without limitation of any kind. That distinction merited some attention by the Commission.

21. The major development in the fifth report lay in the shift of emphasis from liability for risk to a combination of harm and risk. Hence risk was not eliminated as a criterion, but a problem of incompatibility still had to be resolved. He would be in favour of separate chapters in the draft on liability for appreciable harm and on the special situations in which risk was involved, but it would pose no insurmountable difficulty to make use of both conceptual approaches. In that respect, the Special Rapporteur's attempted compromise was laudable.

[10] See 2108th meeting, footnote 6.

[11] United Nations, *Treaty Series*, vol. 1046, p. 120.

[12] See 2108th meeting, footnote 9.

22. Although the amendments suggested by Mr. McCaffrey and Mr. Hayes (2109th meeting) were not formal drafting proposals, it might be useful to refer them to the Drafting Committee for consideration. Such a procedure would not be inconsistent with the Commission's established practice. With particular reference to draft article 1, Mr. McCaffrey's proposed changes (*ibid.*, para. 13) eliminated some unnecessary elements, although he himself felt that the question whether the term "territory" was redundant remained open. As for choosing between "acts" and "activities", the Commission need not be unduly concerned, since it was usually possible to differentiate between the two terms in practice.

23. A further point which at first glance seemed merely to relate to drafting but which in fact had substantive implications was the question of perceivable risk, and he would tentatively favour using the expression "discernible risk" instead. He agreed that some way must be found to differentiate according to the degree of seriousness of the risk to which acts or activities gave rise.

24. The word "simple", used in draft article 2 (*a*) (ii) to qualify examination of the activity, was perhaps infelicitous, but the problem was one to which the Drafting Committee could find a solution. A more difficult issue was how to find a substitute in draft article 1 for the word "places". While inelegant from a legal standpoint, the term at least had the virtue of being readily understood, yet he foresaw it being replaced by "sites", "locations" or even "areas".

25. He agreed with Mr. McCaffrey that the expression "throughout the process" was ill-chosen and with his suggestion (*ibid.*, para. 15) that it would be better to refer in article 2 (*b*) to "continuing transboundary harm". The Commission must also consider how best to formulate a provision for the situation in which activities carried on within the jurisdiction or control of one State had an impact on a State geographically far removed from the State of origin, or where a number of States were affected.

26. Of equal importance was the question of the "global commons", which was specifically included in Principle 21 of the Stockholm Declaration and was a concept that was beginning to be applied to the atmosphere. It was clear law that a State had sovereignty over its atmosphere up to the point at which outer space began, but there was now a growing tendency to recognize that the atmosphere was also a part of the global commons—i.e. the shared resources of mankind—and it was necessary to reconcile those two concepts of sovereignty and the global commons. The issue was by no means academic, givent current concern over the impact of chlorofluorocarbons on the ozone layer and of "greenhouse" gases on global warming, and the question of how liability was to be approached in such cases could not simply be shelved. In the long term it might be possible to proceed to a law-making exercise based on the principle that, where a particular activity seriously degraded the environment and a State or States knowingly and wilfully persisted in that activity, liability might ensue. Serious consideration was also being given in law-making forums to the establishment of compensation funds, which would seem to reflect a "no-fault" approach.

27. In some parts of the draft, the difficulties appeared to stem from the language rather than from the underlying concepts. In the title of draft article 3, the need to choose between "attribution" and "assignment" of obligations could be circumvented by adopting Mr. McCaffrey's suggested alternative: "Determination of liability". It was important to avoid using terms such as "reparation" (art. 9) which might imply that the Commission was developing a branch of other related areas of law, such as State responsibility, under which the term had a specific meaning.

28. The nature of the topic warranted scrutiny of existing precedents, including the decisions of international tribunals, for example in the *Trail Smelter*, *Lake Lanoux*[13] and *Corfu Channel*[14] cases. Such precedents would provide the foundation for the "harm-oriented" provisions of the draft. The Commission might also take into account the series of international conventions on highly hazardous activities, such as the 1962 Convention on the Liability of Operators of Nuclear Ships, the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the 1960 Convention on Third Party Liability in the Field of Nuclear Energy, the 1971 Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, the 1972 Convention on International Liability for Damage Caused by Space Objects and the 1969 International Convention on Civil Liability for Oil Pollution Damage.[15] Those precedents might provide the foundation for a separate chapter in which liability was based on risk. The Commission might also consider the work of law-making conferences and meetings of experts dealing with the problems which the planned framework convention was intended to cover. The sense of urgency felt in other forums with regard to environmental modification and climatic change had already found expression in Recommendations 70 and 71 of the Action Plan for the Human Environment adopted by the United Nations Conference on the Human Environment in 1972.[16]

29. The Commission should, in those circumstances, adopt an open-minded approach, with due regard to differing views and also to the work being done elsewhere. The Commission was in a position to make a unique contribution to the progressive development of important questions of international environmental law and ought not to be seen to be abdicating its responsibilities and leaving the matter to other law-making organs. For those reasons, he welcomed the thoughtful spirit of the Special Rapporteur's fifth report and its invitation to dialogue, to which the Commission had responded. Clearly, the level and tone of the debate suggested a spirit of conciliation. He was satisfied that an accommodation could be found, reflecting the need for a separate chapter on each of the two foundations of liability, namely "harm" and "risk", the former based on the decisions of international tribunals and the writings of publicists, and the second taking into account conventions on highly hazardous activities.

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[13] Original French text in United Nations, *Reports of International Arbitral Awards*, 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.

[14] See 2108th meeting, footnote 10.

[15] References to these Conventions are given in document A/CN.4/384, annex I.

[16] *Report of the United Nations Conference on the Human Environment . . . , op. cit.* (2108th meeting, footnote 6), part one, chap. II.B.

30. Mr. TOMUSCHAT said that the present topic was undeniably the most complex on the Commission's agenda. Moreover, it was now clear that the parallel which had originally been drawn with the topic of State responsibility was misleading. State responsibility was mainly confined to secondary rules, whereas the Commission's chief task with the present topic was to draw up primary rules. Those rules centred on protecting the environment, although the draft articles did not explicitly say so, except in draft article 2 (*c*). The Commission should not shy away from issues of such immediate concern; indeed, if it confined itself to problems described by politicians as "academic", its very existence might one day be called into question. He therefore welcomed the Special Rapporteur's efforts to break new ground in his fifth report (A/CN.4/423).

31. The draft articles themselves were examples of progressive development of the law, although many of the rules proposed therein were based on existing instruments which constituted the fast-developing corpus of environmental law. There was now a profuse growth of such instruments, yet customary rules of sufficient precision were hard to find. The law in the matter must be developed, given the absence of ready-made solutions for the various problems involved. In view of the rapid expansion of environmental law in the past decade, the Commission must also ask itself the difficult question whether there was still a need for a kind of "umbrella" convention. Many legal instruments already set standards which were much more detailed and stringent than the rules proposed by the Special Rapporteur. The relevant EEC law, for instance, was to be found in dozens of specific directives. Yet those instruments did not form a coherent whole. The Commission, by contrast, was attempting to devise a coherent and comprehensive legal framework, albeit one which could perform only a subsidiary function, since specific rules must always take precedence.

32. The foundation of the draft articles could not yet be taken for granted. The provisions in the revised draft articles 1 to 9, and especially in articles 6 to 9, must be framed with the utmost care. It was on those articles, prescribing what States should do in given situations, that the burden of the topic rested. Draft article 8, on prevention, formulated the most important of those rules, placing a general duty on States to monitor and keep under their control activities carried on in their territory or under their jurisdiction or control. The proposed rule blurred to some extent the strict dividing line between acts of State and private acts which was to be found in part 1 of the draft articles on State responsibility.[17] The same rule was embodied in many existing special régimes, but had never before been formulated in such broad and comprehensive terms. Because of its fundamental importance, it should change places with draft article 7, on co-operation, which was a step subsequent to prevention. Again, the precise legal meaning of the principle of co-operation set out in article 7 was still unclear, although it had had the blessing of the General Assembly in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[18] which the ICJ, in its judgment in the *Nicaragua* case,[19] had declared generally to embody customary law.

33. Apart from the primary rules, chapters I and II of the draft, and especially draft articles 1, 3 and 8, contained some propositions which might be termed "general qualifiers" of any legal obligation arising under international law. Those propositions defined the scope *ratione temporis*, *ratione territoriae* or *ratione materiae* of the international obligations to be set out in the draft. He doubted, however, whether they should be given such explicit form. In article 1, it was not necessary to state that the articles applied with respect to activities "carried on in the territory of a State or in other places under its jurisdiction ... or ... under its control": that was a general rule of international law which applied *pari passu* to obligations to ensure respect for human rights, to combat certain diseases, to promote disarmament, not to permit nuclear proliferation, and so on. Article 1 could therefore be simplified, either by using the wording suggested by Mr. McCaffrey (2109th meeting, para. 13) or by an even simpler form of words such as:

> "The present articles shall apply to activities whose operation causes transboundary harm or entails an appreciable risk thereof."

34. Another general qualifier was to be found in draft article 3, relating to the duty of prevention laid down in article 8. The provisions of article 3 ought therefore to be part of article 8. Yet he doubted whether there was anything new in article 3: it merely contemplated a situation which invariably arose whenever a State undertook to combat certain social evils. If the State possessed actual knowledge of the harm, the situation was clear-cut; if it did not, the ordinary obligation of due diligence applied. In that light, the second sentence of article 8 appeared to state the obvious. According to the principle of due diligence, States were bound to take measures corresponding to their undertakings. The only problem was the kinds of measures they were bound to take: those which were both objectively necessary and technically feasible, or those which they could afford to carry out in keeping with their own economic and technical resources? In short, the general qualifiers were superfluous; there was nothing in them that went beyond the general rules governing the extent and the scope of obligations under international law.

35. Another group of provisions, those in draft article 9 on reparation, might be described as an autonomous set of secondary rules. The duty to make reparation or provide compensation derived either from a breach of an international obligation or from other basic principles of international law, especially the principle that the innocent victim should not be left to bear the whole loss. It had been argued that the State of origin might itself be innocent. But where did that leave the "victim" State? If a State could not prevent a hazardous activity being carried on by other States, it should at least be compensated if it was harmed as a result of the risk involved. The principle that the party which benefited from an activity must also bear its burden was a logical corollary to the sovereign equality of States. Nevertheless, he could not agree to the formulation of article 9. It seemed unacceptable that there should be a

[17] See 2108th meeting, footnote 8.

[18] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[19] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14.

duty to make reparation or provide compensation simply because transboundary harm had occurred. The underlying justification was not made sufficiently clear. In any event, the rule should not apply to every case of damage; if the risk factor was absent and the State of origin had not been able to foresee the damage, it should incur a duty of reparation only where the damage was serious. In such cases, a simple causal link should be enough to establish liability. Like Mr. Beesley, he was of the view that liability on account of risk and liability on account of serious harm should be dealt with separately.

36. The reference to negotiation in article 9 was awkward. Although negotiation was a standard method of dispute settlement, it should be based on clear guiding principles. Unfortunately he could not suggest an alternative formula at present, since the equity principle was probably too vague.

37. In short, chapters I and II of the draft contained many disparate elements which should be separated and rearranged.

38. As to the new draft articles 10 to 17 of chapter III, there was some originality in proposing formal procedures for an environmental impact assessment of harmful activities, although such procedures might not be appropriate for all kinds of activities. The report (A/CN.4/423, para. 108 (*b*)) mentioned the use of certain fertilizers, car exhaust emissions, etc. The activities in question called for different treatment, in the form of better international regulation, either through multilateral conferences or through the competent international organizations. The multilateral framework was always preferable: bilateral means of settlement should be pursued only where neighbourly relations were jeopardized, for instance by the siting of potentially harmful installations such as nuclear power plants or nuclear waste dumps close to an international boundary. In such cases, the neighbouring State should have a right to object, since there was an *a priori* international element which warranted curtailing the sovereign powers of the territorial State. He would therefore like to see a clearer statement of the scope *ratione materiae* of articles 10 *et seq.* The system proposed by the Special Rapporteur might prove unworkable if couched in terms which covered any human activity; States might simply reject it on those grounds.

39. There was much room for improvement in draft article 10. The phrase "If a State has reason to believe . . . " should be deleted; States were deemed to be aware of what was going on in their territories. The article should begin with the words "States shall". One difficulty was the same as in the case of the draft articles on the law of the non-navigational uses of international watercourses: the need to encourage States to provide information without notifications being treated as tantamount to an admission of guilt. The article would suffice for certain cases, notably for the siting of potentially dangerous installations close to an international boundary. In other cases, it should be for the affected States to lodge objections.

40. Given the nature of the topic, the Commission needed some assistance on the environmental aspects, perhaps from UNEP or ECE. Establishing a dialogue with those bodies would improve the Commission's methods of work. Furthermore, it should be borne in mind that most of the activities contemplated in the draft articles were carried on by private persons. The draft might therefore include a suggestion that private enterprises should take out insurance when they engaged in hazardous activities, and priority could be given to private rather than inter-State liability.

41. Lastly, the draft articles did not adequately cover harm inflicted on the "commons" of mankind: articles 10 *et seq.* were apparently confined to cases of direct damage to States. That was an additional argument for seeking a contribution from the relevant international organizations.

42. Mr. OGISO congratulated the Special Rapporteur on his excellent fifth report (A/CN.4/423) on an extremely difficult topic.

43. In the course of the Commission's consideration of the topic of State responsibility, it had been recognized that there were areas in which physical harm could arise out of a State activity that was not necessarily a wrongful act under international law. It had accordingly been argued that the Commission should consider the question of international liability in those circumstances as a separate topic from that of the traditional rules of State responsibility. As a result, the present topic was an independent item on the Commission's agenda. It was significant, however, that some members of the Commission had at the time opposed the idea of the topic being taken up as a separate item. At the thirty-fourth session, in 1982, Mr. Ushakov had said that:

> . . . There was, indeed, no general rule of international law that imposed a duty on a State to indemnify its nationals, another State or the nationals of that other State for injury suffered as the result of an activity not prohibited by international law which it had carried out. . . .

and had concluded that:

> . . . For the time being, it would be Utopian to draw up general rules of international law on international liability for injurious consequences arising out of acts not prohibited by international law.[20]

44. When the Commission had started its work on the topic, it had done so without any firm assumption that international liability existed for transboundary harm "arising out of acts not prohibited by international law". His own feeling was that the matter fell into a grey area where it was not clear whether liability existed or not. It was certainly not correct to proceed on the basic supposition that there was a principle whereby the State of origin incurred liability for transboundary harm.

45. Two possible approaches could be made to the subject of transboundary harm. The first was to consider that liability existed and, as suggested by the Special Rapporteur, that the notion of strict liability tended to apply. In that regard, as he had repeatedly pointed out, the precedents in the matter of strict international liability related only to a limited field, such as space activities or peaceful nuclear activities. There were no such precedents regarding a possible general principle of strict liability for transboundary harm caused by activities which were lawful under international law. Such a principle might perhaps be considered under the heading of progressive development of international law, but he took the view that the results would be problematic.

46. The second approach was to place the emphasis on prevention, as the Special Rapporteur had in fact done to a considerable extent. International liability would then arise

[20] *Yearbook . . . 1982*, vol. I, p. 249, 1739th meeting, paras. 47-48.

from the failure to take preventive measures to avoid certain harmful effects of a State's lawful activity. Liability would result from the violation of rules on such matters as prevention, co-operation and the balance of interests, which could be described as "soft law".

47. Of those two approaches, the second seemed the more appropriate. It would serve to expand the notion of traditional State responsibility into the grey area and could be adopted despite the fact that it had not been envisaged when the Commission had first taken up the topic. Admittedly, it could be argued that lack of prevention, or failure to take the required preventive measures, constituted a wrongful act under international law and was therefore beyond the scope of the subject-matter, but attempts to seek the sources of liability in acts not prohibited by international law could ultimately mean going round in circles.

48. Turning to the revised draft articles 1 to 9 submitted by the Special Rapporteur, he said that the words "throughout the process", in article 1, did not refer simply to the period of performance of the activity which had the harmful effect. As he saw it, "throughout the process" covered the whole of the period during which the harmful effect was suffered, even after the end of the activity which had caused it. Interesting in that connection was the following view expressed by the representative of Austria in the Sixth Committee of the General Assembly and cited by the Special Rapporteur in his report (*ibid.*, footnote 7):

> . . . the concept of liability for acts not prohibited by international law related to fundamentally different situations requiring different approaches. One situation had to do with hazardous activities which carried with them the risk of disastrous consequences in the event of an accident, but which, in their normal operation, did not have an adverse impact on other States or on the international community as a whole. Thus it was only in the event of an accident that the question of liability would arise. By its very nature, such liability must be absolute and strict, permitting no exceptions.

That representative had then added that the second situation, namely that of transboundary and long-range impact on the environment, related to the cumulative effect of certain harmful activities, a situation in which liability had two distinct functions: first, to cover the risk of an accident, and secondly, to cover significant harm caused in the territory of other States through a normal operation.

49. In subparagraphs (*a*) and (*b*) of draft article 2, the concept of "risk" had been retained notwithstanding certain objections voiced both in the Commission and in the Sixth Committee. The article posed three problems. To begin with, the expression "appreciable risk" should be replaced throughout the draft by "significant risk", which was the expression used in a number of relevant existing instruments, including some mentioned by the Special Rapporteur, such as the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (*ibid.*, para. 80), the annex to recommendation C(74)224 on "Principles concerning transfrontier pollution" adopted by the Council of OECD in 1974 (*ibid.*, para. 85) and the 1979 Convention on Long-range Transboundary Air Pollution (*ibid.*, para. 91). It was worth noting that the arbitral tribunal in the *Trail Smelter* case[21] had used the expression "damage of a material nature", which was close to the meaning of "significant" or "substantial". Since the concept of "risk" was itself not very explicit and contained some subjective elements, it would be preferable to qualify it with the word "significant".

50. Subparagraph (*a*) (ii) stated that "appreciable risk" was deemed to include "both the low probability of very considerable [disastrous] transboundary harm and the high probability of minor appreciable harm". Low probability of very considerable transboundary harm could be understood to cover such cases as accidents in nuclear power plants. However, the significance of the other category, "high probability of minor appreciable harm", was not at all clear. Perhaps the idea was to cover harm to the environment caused by an accumulation of small amounts of harmful materials over a long period of time. If that was indeed the intention, it should be spelt out in the article itself by introducing wording along the following lines: " . . . having a cumulative effect leading to environmental pollution".

51. The Commission's report on its previous session referred to the Special Rapporteur's interpretation of the expression "appreciable risk" as "meaning that it had to be greater than a normal risk".[22] If the Special Rapporteur still held that view, he would suggest that the interpretation in question be incorporated in article 2 itself, thereby clarifying the meaning of "appreciable risk", or preferably "significant risk".

52. The definition of "Affected State" in subparagraph (*e*) covered both a State which had in fact been harmed or was being harmed and a State which might be harmed in the future. The latter case seemed to be encompassed by the idea of "minor appreciable harm" which he had discussed in connection with subparagraph (*a*) (ii). It was not at all appropriate to treat the two categories of States in the same manner and he would urge that the liability towards a State which had already suffered harm and the liability towards a State which might suffer harm in the future should be treated differently.

53. The title of draft article 3, "Assignment of obligations", was difficult to understand and should be examined by the Drafting Committee.

The meeting rose at 1 p.m.

[21] See 2108th meeting, footnote 9.

[22] *Yearbook . . . 1988*, vol. II (Part Two), p. 16, para. 62.

2111th MEETING

Friday, 2 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter,

Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,[1] A/CN.4/413,[2] A/CN.4/423,[3] (A/CN.4/L.431, sect. B)[4]

[Agenda item 7]

Fifth report of the Special Rapporteur (*continued*)

Articles 1 to 17[5] (*continued*)

1. Mr. OGISO, continuing the statement he had begun at the previous meeting, said that he wished first to clarify a point on which he feared he might have been misunderstood: it was only in the event of physical harm of a transboundary nature, of course, that failure to prevent it might be considered as constituting a wrongful act by the State of origin and, consequently, as the source of an obligation to make reparation.

2. Draft article 3 established the obligations of the State of origin, adding (para. 2) that that State was "presumed" to have the knowledge or the means of knowing that an activity was being carried on in its territory. That condition seemed to contradict the moral principle often cited by the Special Rapporteur that the innocent victim should not be left to bear alone the burden of the harm. It was true that, important as it was, that principle was only a moral one, and the fact that article 3 no longer made a legal principle of it was to be welcomed.

3. Draft article 8 set forth the obligations of the State of origin with regard to prevention. However, in his fifth report (A/CN.4/423, paras. 65-66), the Special Rapporteur stated that it was for those who carried on the activity in question—and consequently not only for the State, but also for private individuals or corporations—to take the necessary preventive measures. Although he had no objection as to the substance, he would point out that international conventions did not normally impose obligations directly upon individuals, but only on States, which then had a responsibility to enact the laws and regulations necessary to enforce such obligations. The text of article 8 should be amended accordingly.

4. He noted with satisfaction the introduction of the notion of a "balance of interests" in draft article 9. The only way to achieve such a balance was through negotiations in good faith between the State of origin and the affected State. However, the precise criteria to be applied in deciding how to restore that balance were likely to give rise to difficult problems, for example in the case of an accident which had caused harm in both the State of origin and the affected State.

5. In the new draft articles 10 to 17, the Special Rapporteur proposed procedures of assessment, notification and information which constituted a régime similar to that proposed in the draft articles on the law of the non-navigational uses of international watercourses. While generally agreeing on the substance, he wondered whether the Commission should establish procedures as detailed as those proposed, since the aim of the draft articles under consideration was to deal with the liability of States when transboundary harm arose, not to establish international procedures for the prevention of all possible transboundary harm. The extent to which a State had fulfilled its obligation of prevention could constitute an important element in the assessment of its liability, but the draft articles themselves did not have to enter into those details. In order for the preventive measures to be sufficiently flexible it would be more appropriate, in his view, to establish bilateral or regional arrangements among interested States, or international mechanisms for specific purposes such as pollution prevention, rather than to try to establish a general legal régime applicable to all cases, even in the form of a framework agreement. He therefore wondered whether the part of the draft devoted to procedure should not be confined to stating a general principle and encouraging countries with common interests to establish a regional co-operation mechanism. Several members of the Commission had, in that connection, cited the example of the Economic Commission for Europe. He would also like to have some details about the practical operation of the co-operative machinery established under the regional agreements which the Special Rapporteur mentioned in his report (*ibid.*, paras. 80 *et seq.*).

6. Mr. FRANCIS said that, now that the Commission had a full set of draft articles before it, the general principles upon which the text as a whole was based needed to be brought into proper perspective. In that connection, the Commission might draw upon the example of the Charter of Economic Rights and Duties of States[6] and place at the beginning of the general provisions an article briefly setting forth the principles to be developed in the rest of the draft. Those principles would be the freedom of action of States, the obligation of prevention, the obligation of co-operation and, lastly, the obligation of reparation—which ought, however, in his view to be renamed. In view of the provisions of article 35 of part 1 of the draft articles on State responsibility,[7] namely that "Preclusion of the wrongfulness of an act of a State . . . does not prejudge any question that may arise in regard to compensation for damage caused by that act", and of the fact that the draft under consideration dealt, by definition, only with the consequences of activities whose wrongfulness was precluded, he agreed with Mr. Reuter (2110th meeting) that the word "reparation" was inappropriate.

7. Taking up a suggestion made by Mr. Yankov in connection with another set of draft articles, he also proposed that the article on "Use of terms" be placed at the very beginning of the draft. The positions of draft articles 1 and

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[1] Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

[5] For the texts, see 2108th meeting, para. 1.

[6] General Assembly resolution 3281 (XXIX) of 12 December 1974.

[7] See 2108th meeting, footnote 8.

2 would thus be reversed, and the article containing a brief summary of principles which he wished to add to the draft would come immediately afterwards.

8. With regard to draft article 1, he associated himself with the criticisms already formulated, particularly in connection with the expressions "throughout the process" and "in other places". The text was weighed down by too many superfluous elements. In particular, he was unconvinced by the arguments advanced by the Special Rapporteur to justify the use of the expression "jurisdiction as recognized by international law". The best solution would be to revert to the wording proposed by the Special Rapporteur in his third report[8]—"within the territory or control" of a State—since the word "control" also covered cases where a part of the territory of a State was occupied illegally by another State. In order to avoid all ambiguity, it might be specified in the commentary to article 1 that the word "control" should in no case be interpreted as legitimizing an illegal occupation; such an explanation would, however, be out of place in the text of the article.

9. Unwieldy as it was, article 1 was also inadequate, first, because it spoke only of "activities", although isolated acts (i.e. acts not forming part of an organized activity) could also be a source of transboundary harm. Above all, however, the article failed to take account of "situations", which he thought it essential to bring within the scope of the draft, especially bearing in mind what the previous Special Rapporteur had said in his fifth report:

> . . . Sometimes . . . it is not so much an identified activity as the existence of a state of affairs . . . which gives rise or may give rise to physical consequences with transboundary effects. . . .
>
> . . . there are cases in which a source State has a duty to give a warning of immediate danger, whether arising from an activity or from a natural cause. . . . [9]

The concept of a "situation" was thus essential and should be spelt out in the text of article 1. On the other hand, an express mention of isolated acts might perhaps not be necessary, it being sufficient to indicate in the article on the use of terms that the word "activity" should be interpreted as encompassing acts of that nature.

10. With regard to draft article 2 and, more particularly, the expressions "appreciable risk" and "activities involving risk", he agreed with Mr. Ogiso (*ibid.*) that in view of the content of article 1 it would be preferable not to define risk or activities involving risk. On the other hand, the definition of "transboundary harm" was useful, and the expression "appreciable harm" also needed to be explained.

11. In his fifth report (A/CN.4/423, para. 32), the Special Rapporteur recognized that the expression "under the control" of the State of origin repeatedly used in the draft presented certain difficulties. Care should be taken not to disturb the balance of the draft by refusing to treat the illegal occupant of a State, to the extent that he effectively controlled the territory of that State, as though he were lawfully exercising sovereignty over it: to preclude the occupying State's liability would be to make the State lawfully responsible for the territory liable for an activity over which it did not exercise effective control.

12. Remarking that, as the work on the topic progressed, the Commission was trying to ensure that the draft did not mirror part 1 of the draft articles on State responsibility too closely, he said that he would like to see the Commission revert to the schematic outline. It was not that the schematic outline was sacred and could not be departed from, but it did undoubtedly, as the Sixth Committee of the General Assembly had recognized at the time, provide the basis for the Commission's work on the topic. In that connection, he recalled that, as Mr. Reuter (2110th meeting) had pointed out, the potentially affected State was not necessarily situated near the State of origin. He also recalled with interest that Mr. Reuter had wondered whether the Commission would achieve better results by adopting a maximalist approach or, on the contrary, by contenting itself with a minimalist approach that would leave States some latitude to conduct their bilateral relations as they deemed fit; that had been the general idea underlying the schematic outline. Mr. Tomuschat (*ibid.*) had been right to refer to primary rules; but in the view of the previous Special Rapporteur those rules came into play from the moment when a State failed to provide the necessary compensation. He personally was prepared to revert to his initial position based upon the duty of diligence. But it would be interesting to know whether, in abandoning the schematic outline, the Commission really believed that it was choosing the best solution.

13. Turning to the question of the environment and its place in the draft articles, he recalled that the matter had been raised as early as 1978 by the Working Group established by the Commission to consider the scope and nature of the topic. In his view, everything the Commission was doing with regard to the present topic was related to the environment. In that connection, he cited the following passage from the previous Special Rapporteur's preliminary report:

> If the Commission and the General Assembly accept the view that this topic is essentially concerned with the elaboration of primary rules of obligation and that its main immediate reference is to developments within the field of the environment, it might also be agreed expressly to limit the topic, as was recommended by the Working Group set up by the Commission at its thirtieth session in 1978:
>
> > [The topic] concerns the way in which States use, or manage the use of, their physical environment, either within their own territory or in areas not subject to the sovereignty of any State. . . .
> >
> > . . . [10]

14. He also recalled that, at the previous session,[11] he had stated that, in order to avoid delaying the Commission's work, it should be left to another body to identify the environmental issues which might be dealt with within the framework of the draft articles under consideration. However, in view of the developments which had taken place in international relations since that time, he now thought that it would be appropriate for the Commission itself to consider what problems might be addressed in the draft articles. Mr. Beesley (*ibid.*) and the Special Rapporteur were right in saying that there were perspectives to be explored in that connection, of course with all necessary care. For example, pending the establishment of the International Sea-Bed Authority envisaged in the 1982

[8] *Yearbook . . . 1987*, vol. II (Part One), p. 48, document A/CN.4/405, para. 6.

[9] *Yearbook . . . 1984*, vol. II (Part One), p. 166, document A/CN.4/383 and Add.1, paras. 31-32.

[10] *Yearbook . . . 1980*, vol. II (Part One), pp. 265-266, document A/CN.4/334 and Add.1 and 2, para. 65.

[11] *Yearbook . . . 1988*, vol. I, p. 35, 2048th meeting, para. 32.

United Nations Convention on the Law of the Sea, the Commission might have a role to play in the sphere of maritime transboundary harm. Accordingly, he suggested that, since the Commission had set up a Working Group to consider what topics it should study next (see 2104th meeting, para. 75), it should request that Group to take up the issue as a matter of priority.

15. Mr. PAWLAK said that the more the Commission learned about the present topic, the more it became aware of its complexity, and the Special Rapporteur's fifth report (A/CN.4/423) offered more food for thought.

16. He welcomed the evolution of the Special Rapporteur's views as reflected in the revised draft article 1. In conformity with the comments made in the Commission and in the Sixth Committee of the General Assembly, the text no longer made risk the basic factor in liability, but combined that concept with that of harmful activity. For his part, he would prefer liability to be based on harm, not on a combination of risk and harm, because it was not important for the innocent victim, namely the other State or its nationals, whether activities undertaken in a given country involved risk or not. What was important was that, where damage had been done, it should be repaired and losses compensated. The criterion of risk could play a role, however, with regard to prevention. It must not be forgotten that, as a result of technological progress, transboundary harm might occur at any moment, affecting not only a single State or a limited number of States, but the entire planet. That was why he attached such importance to the issue of scope dealt with in article 1.

17. There was still room for improvement in the revised text of article 1, and Mr. McCaffrey's proposal (2109th meeting, para. 13) offered one possibility for improvement that warranted further discussion. As a general rule, the Commission should give the Drafting Committee clear guidelines on the topic, the fundamental idea being that a State, a person or an economic entity undertaking a profitable, lawful but sometimes hazardous activity should bear the full cost of that activity, including the cost of possible accidents. In other words, the innocent victim of an activity that caused transboundary harm should be protected by international law. To those who argued that the first victims of such an activity were the State of origin and its nationals, he would point out that it was they, and not the foreign victims, who derived profits and benefits therefrom. As to the wording, it seemed preferable to use the word "significant" rather than "appreciable" to qualify risk and harm. There was also a need for further delimitation of "transboundary harm" through recourse to an objective assessment of the cost and the results.

18. Draft article 6 reflected an idea which he had expressed at the previous session,[12] namely that prevailing trends in contemporary international law, such as those incorporated in Principle 21 of the Stockholm Declaration, should be taken into account. The growing interdependence of all States required a realistic approach to the principles of sovereignty and territorial integrity of States. The mechanisms provided for in the draft articles should deal with cases where it was not one country, but all of mankind that would be affected by the consequences of a lawful but dangerous activity. He therefore shared the Special Rapporteur's view that, in reflecting Principle 21, article 6

> gives expression to the two sides of sovereignty: on the one hand, the freedom of a State to do as it wishes within its own territory; and on the other, the inviolability of its territory with regard to effects originating outside it. ... (A/CN.4/423, para. 56.)

19. In fact, article 6 represented a compromise between the principle of limited sovereignty and that of territorial integrity. Could such an approach be accepted? That was a matter for the Commission to decide, but it was even more important to know whether Governments would be willing to accept that approach in their international agreements, for which the draft articles would create a framework. Gaining such acceptance would not be an easy task, but he saw no other solution if the planet was to be preserved. In support of that approach, the general principle of good-neighbourliness, as set out in Article 74 of the Charter of the United Nations, could also be cited.

20. The provisions of the new draft article 10 also seemed to meet a need; but there again, were States ready to accept such provisions? He suspected that most of them would not be prepared to do so. Such detailed procedures as the Special Rapporteur was proposing and which the Commission was incorporating in the draft articles on the law of the non-navigational uses of international watercourses should, of course, be limited to particular types of activities: in that regard, he shared the views expressed by Mr. Ogiso. He also thought that the task of establishing the obligations of a presumed State of origin to assess activities involving risk, to notify the States presumed to be affected and to explain the measures it proposed to take to comply with its obligation to compensate should be left to States, instead of being included in the draft framework convention which the Commission was elaborating.

21. Mr. SEPÚLVEDA GUTIÉRREZ commended the Special Rapporteur on the quality and practical usefulness of his fifth report (A/CN.4/423), which was all the more remarkable because doctrine and customary law on the topic were extremely limited. The guarded optimism he had expressed at the previous session concerning the future of the topic had not abandoned him, no matter what had been said about the draft's "grey areas" or the fear of imposing heightened responsibilities and obligations on the States that were most capable of causing harm.

22. In general, he accepted the revised texts proposed by the Special Rapporteur for articles 1 to 9, although with a few reservations, some of which had already been expressed by other members of the Commission. The grounds for agreement were actually broad enough for the Drafting Committee to find appropriate formulations accommodating the views expressed.

23. That having been said, he believed the Commission should not allow itself to be swayed by criticism that might lead it either to engage in an abstract exercise or to expand the scope of the topic unduly. It was better, for the time being, to work on a set of draft articles, however limited they might be, so that progress could be made and some of the urgent problems raised by liability for harm resolved. The articles being drafted embodied principles that bore repetition and would be of value both as doctrine and as practical reference points. On the one hand, as Mr. Boutros-Ghali had pointed out (2096th meeting) in connection with the draft Code of Crimes against the Peace and Security of

[12] *Ibid.*, p. 25, 2047th meeting, para. 17.

Mankind, the provisions would publicize a number of notions about the scope of a certain type of international obligation. On the other hand, international conferences and recently concluded agreements showed that the international community was prepared to consider proposals aimed at developing and codifying international law on the topic, and that such action actually corresponded to its need to prevent and settle disputes and to help reinforce international solidarity. The Commission should therefore persevere with its task.

24. Turning to chapter III of the draft (Notification, information and warning by the affected State), he said he was pleased that the Special Rapporteur had chosen to take on such an important issue; it had often been said in the Commission that it was important to go forward, even on unknown terrain, without waiting for customary law to be created.

25. Nevertheless, the régime foreseen by the Special Rapporteur in the new draft articles 10 to 17 required a whole range of new and unaccustomed actions and obligations for States, and a cautious approach was in order. Thus, while he endorsed the eight new articles, he believed that some of the rules set out in them should be reviewed and, in particular, the establishment of bodies responsible for performing the various procedures described therein should be envisaged.

26. He had some doubts, for example, about draft article 10 (Assessment, notification and information), which was at the heart of the proposed régime and which imposed a whole range of rather complex behaviour and duties on States. First, the text called for application of a set of procedures to determine whether an activity might cause or risk causing harm in the more or less distant future. Such an obligation would certainly require the establishment of competent State bodies, but, even so, the task of arriving at an accurate determination of whether an activity might cause or risk causing transboundary harm was a difficult and delicate one.

27. Secondly, the fact that the State of origin would be obliged to warn the State or States that might be affected raised a number of problems. Since notification entailed certain responsibilities from the moment it took place, a State which failed to adopt the necessary measures to prevent the harm or attenuate the risk could hardly dissociate itself from the consequences of a given activity. The State would have to accompany the notification with certain technical data and announce the measures it intended to adopt. That first stage of the process leading to the creation of a régime of prevention and co-operation should be approached with the utmost care, but the Special Rapporteur would surely be able to find appropriate wording.

28. He had no comments to make concerning draft article 11. On the other hand, draft article 12 (Warning by the presumed affected State) presented certain problems for him, in that a State which believed it was affected might, because of lack of means, have difficulty in providing the documented technical explanation required of it by that article.

29. He had no difficulty in accepting draft articles 13, 14 and 15. He also accepted the principle behind draft article 16 (Obligation to negotiate), but believed that the utmost care should be taken over the wording, for the article dealt with a delicate and crucial method of settling disagreements on liability and means of reparation. As for draft article 17 (Absence of reply to the notification under article 12), the final part of the text needed to be developed, but that was merely a question of drafting.

30. Mr. Sreenivasa RAO, congratulating the Special Rapporteur on the open-minded spirit and fresh approach evident in his fifth report (A/CN.4/423), noted that he had attempted, albeit not entirely successfully, to define the scope of the topic. By incorporating the concept of risk and by addressing activities—not isolated acts—within the jurisdiction or control of a State which "knew or had means of knowing" (art. 3) that those activities could cause appreciable harm to the people or property of another State or States, the Special Rapporteur had delineated to some extent the limits of actionable claims for reparation. He had emphasized some basic postulates: that the problem of liability should be dealt with at the inter-State level, and that the innocent victim of a harmful transboundary effect should not be left to bear the loss. He had also brought out the concepts of co-operation between the State of origin and affected States, prevention and redress.

31. In dealing with co-operation, the Special Rapporteur emphasized that the duty to co-operate was placed equally on the affected State where it "has the means to do so, for instance if it has more advanced technology" (*ibid.*, para. 62), while rightly warning immediately afterwards that harm caused by an accident arising out of otherwise lawful activities should not be used "to seek political advantage or to air rivalries of any kind". Indeed, such action could be construed as being contrary to good faith in negotiations, as had been clearly stated by the arbitral tribunal in the *Lake Lanoux* case,[13] and would jeopardize the need to restore the balance of interests between the State of origin and the affected State. Restoring that balance of interests, which was the fundamental objective of reparation for harm, brought into play several important criteria which the Special Rapporteur enumerated (*ibid.*, para. 70): the benefit which the affected State itself might derive from the activity; the interdependence of the modern world; the costs of prevention; and the allocation of the costs of the activity to the State which was its principal beneficiary. Of course, that list was not exhaustive and other criteria might apply in given cases. He himself did not believe, however, that the failure of the State of origin to request the assistance of a competent international organization should be interpreted to mean that it had not complied with its obligation to co-operate, as stated in the report (*ibid.*, para. 62). Further consideration should be given to the matter, but, above all, requesting assistance from an international organization should not be made a formal obligation.

32. With regard to prevention, the Special Rapporteur, conscious of the limits of that concept, specified that the obligation in the matter was not absolute and that if, for example, an activity was carried on by private individuals or corporations, it would not be the State but those private individuals or corporations that would have to institute the actual means of prevention, the only duty of the State being to convert that obligation into a rule of domestic law and to enforce it (*ibid.*, para. 66). For the special case of

[13] See 2110th meeting, footnote 13.

the developing countries, the Special Rapporteur indicated that States had to use the means of prevention "in so far as they are able" (*ibid.*, para. 67).

33. In chapter III of the draft, the Special Rapporteur had submitted new articles on notification, information, warning by the affected State and steps following notification—all of them procedural provisions which dealt with the duty of the State of origin and the affected State to co-operate, to negotiate and to reach agreement, on the understanding that, failing such agreement, fact-finding machinery would be established, the conclusions of which would, however, have only an advisory character.

34. In response to the concern aroused by problems connected with the environment, the Special Rapporteur had taken a bold step by including in the definition of "transboundary harm" (art. 2 (*c*)) the appreciable harm caused not only to persons or objects and to the use or enjoyment of given areas, but also to the environment.

35. He urged the Special Rapporteur to persevere along that road and to continue to seek to define the scope of the topic, to identify criteria for restoring the balance of interests between the State of origin and the affected State and, still more important, to enunciate basic policies which the international community should adopt in the common interest.

36. The Special Rapporteur was not alone responsible for the fact that consideration of the topic had not yet gone beyond the stage of technical details, with discussion continuing on the distinction between "significant" and "appreciable" risk and between "harm" and "injury", on the basis of liability (causal, strict or absolute liability) and on the question whether it was desirable to cover, in addition to States, all participants in national life (private enterprises, multinational corporations) in order to ensure that no innocent victim remained without protection. There was a need to consider the topic in greater depth, to consult the experts and the competent international organizations and to hear States themselves. It was also necessary, as had already been observed, to apprehend the subject not in the abstract, but in the light of actual situations and specific activities which were generally agreed to pertain to the topic. There was also a need to avoid indulging in excessive generalization or conceptualization, or paying undue attention to the criterion of "acts not prohibited by international law".

37. He also had some doubts regarding the régime of notification and negotiation proposed by the Special Rapporteur. That régime, which was inspired by the one envisaged for the law of the non-navigational uses of international watercourses, was not appropriate in the present context, particularly where there was more than one affected State. More importantly, unless the proposed notification procedure was further circumscribed and explained, it would amount to an expression of guilt and could result in the assertion of a right of veto by the affected State. In an age when the effects of a unilateral activity, action or decision were not confined to the State of origin, the principle of prior consultation could not be considered as giving rise to an obligation for the affected State to give its consent, and still less as conferring upon it a right of veto. If the prior consultations did not lead to an agreement or an accommodation, they should not have the effect of making a lawful activity an unlawful one, which would then fall under the topic of State responsibility.

38. The fact was that the obligations of the State of origin were only to consult the potentially affected State, to take into consideration its views and interests and, in the event of an accident or damage, to make reparation or bear the legal consequences arising therefrom. He therefore thought that the Special Rapporteur should envisage a régime of consultation—and not of notification—more flexible than the one being proposed. He also entertained doubts regarding the role which a fact-finding commission could play in regard to environmental issues, transboundary harm due to cumulative effects, etc. Opinions might well differ and certain facts might escape scientific observation, with the result that a commission of that kind could create more problems than it would solve.

39. He agreed with Mr. Pawlak that the question of transboundary harm should not be treated only as one of inter-State relations but should be broadened to embrace mankind as a whole and the "global commons". The Special Rapporteur had therefore been right in extending the relevant part of the topic to transboundary harm caused to the environment. The problems of *locus standi* which had been raised in that connection were not insurmountable: there were international institutions which were competent to deal with matters relating to those global commons and which could represent the international community *vis-à-vis* the State of origin.

40. He agreed with Mr. Ogiso (2110th meeting) that it was necessary to go beyond "soft law", namely the principles of good-neighbourliness and good faith in negotiations.

41. Whether, in the case of the present topic, it was engaged in codification or in progressive development of international law, the Commission, with the help of the Special Rapporteur, should formulate within well-defined limits a comprehensive and coherent set of principles governing activities having visible and appreciable transnational—and not solely transboundary—effects, emphasizing not only liability and redress, but also prevention, co-operation and assistance: sharing of information, transfer of technology, disaster prevention and control, insurance, and civil protection at the national and international levels. Those were the elements which would give its full meaning to a topic which, for the time being, did not have a broadly acceptable practical basis.

42. The CHAIRMAN, speaking as a member of the Commission, said that, before commenting on the draft articles submitted by the Special Rapporteur, he would concentrate on four more general issues: the scope of article 1 and the concept of risk; the notion of "appreciable harm"; the obligation to negotiate; and the applicability of the proposed procedure to existing activities.

43. With regard to the problem of scope as defined in draft article 1, he noted that the Special Rapporteur, taking into account the opinions expressed in the Commission and in the Sixth Committee of the General Assembly, had decided not to apply the concept of risk as a factor limiting the scope of the draft to ultra-hazardous activities, but to extend the scope also to dangerous activities and to activities causing permanent harm (creeping pollution). It was doubtful whether that approach would prove acceptable

to States, which would wish to know the precise scope of the obligations they were assuming. Perhaps that could be achieved by formulating stricter wording for articles 1 and 2, or by attaching to them a list of activities which would include both categories—activities involving risk and activities causing permanent harm—making it clear from the outset that they were different categories which needed different treatment.

44. State practice showed that a "list approach" was not as impracticable as had been argued during the debate at the previous session. That approach had been adopted in many international instruments. Mention could also be made in that connection of the draft Framework Agreement on Environmental Impact Assessment in a Transboundary Context which was being prepared by the Economic Commission for Europe and which contained a list of activities, leaving it to the parties to agree on a bilateral basis on further activities which did not appear in the list. Whether or not a list was included, the wording of draft articles 1 and 2 had to be improved and made more specific. That general definition could be supplemented by a list of specific activities which might be shortened or broadened by agreement between the States concerned.

45. In his fifth report (A/CN.4/423), the Special Rapporteur gave a more precise definition of the activities covered by the draft and provided a better picture of what was meant by the expression "jurisdiction or control". It could be noted in passing that it was unnecessary to speak of "effective control", not only for the reason given in the report (*ibid.*, para. 21), but also because the adjective "effective" in no way helped the cause of the developing countries. Moreover, the term "control" had not been introduced to limit the notion of jurisdiction but to cover situations where control without jurisdiction was exercised. The notion of "jurisdiction or control" was, however, limited in draft article 3 by the use of the formula "in its territory or in other places". Yet jurisdiction was not normally confined to "territory or other places". The use of that formula would seem to exclude the responsibility of States for the conduct of transnational corporations which were clearly under their control but which operated in other territories; such an exclusion was surely not intended by the Special Rapporteur. Another formula would have to be found, based perhaps on Mr. McCaffrey's proposal (2109th meeting, para. 13).

46. The second issue was whether the term "appreciable" or "significant" should be used to qualify "transboundary harm". Notwithstanding the extensive debate on that subject, many questions remained unresolved. It was true that, as pointed out by the Special Rapporteur, it was difficult to find a suitable formula to set a reasonable limit or threshold to transboundary interference; there was also agreement on the need to strike a balance between the protection of the environment and the increasing trans-boundary effects of human activity. Moreover, whatever the term chosen, it would necessarily be imprecise and lend itself to differing interpretations. It was also agreed that there was a difference between "appreciable" and "significant": "significant harm" constituted to a higher threshold than "appreciable harm".

47. It was therefore a matter of determining the threshold that would seem acceptable to States. For that purpose, it was best to stay as close as possible to State practice and to study the new trends which were emerging. That was in fact what the Special Rapporteur had done by citing a large number of examples from international law and referring to the material presented by Mr. McCaffrey on the topic of international watercourses. However, the Special Rapporteur had then proposed the term "appreciable". It was there that it was difficult to follow him, for all the examples from State practice which he cited (A/CN.4/423, paras. 80 *et seq.*) referred without exception to "significant risks", to "significant impacts", to "significant effects", etc.: none of them spoke of "appreciable risk". An analysis of more than 60 international instruments, judicial decisions, arbitral awards and other documents had also shown that the term "significant", or an equivalent word, was the one most often used. In the circumstances, it was difficult to see on what basis the Special Rapporteur stated that "the concept of 'significant risk' . . . is in line with . . . 'appreciable risk'" (*ibid.*, para. 91).

48. It could, of course, be argued that the threshold expressed by the term "significant" had already become obsolete, given the deterioration in the environment, and that there was therefore a tendency to use the term "appreciable", which would then be included in the draft as a matter of the progressive development of international law. There again, however, it was apparent from an analysis of the most recent instruments which were or would become legally binding on States that the term "significant" continued to be the preferred formula. That was true of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities[14] (art. 4) and the ECE draft Framework Agreement on Environmental Impact Assessment in a Transboundary Context (paras. 1 and 5). The only conclusion to be drawn was that the Commission would be well advised to use the generally recognized term "significant harm".

49. A similar problem of terminology arose with regard to the third issue on which he wished to comment, namely the obligation to negotiate as opposed to the obligation to hold consultations (chapter III of the draft). The obligation to negotiate represented in a sense the concluding stage in a series of procedural steps which had to be performed by all the parties with respect to the activities referred to in article 1 and the question was to determine the content of the procedural obligations of States.

50. The obligation to notify and inform the potentially affected State or an international organization seemed to be well established. In his view, international organizations should be mentioned because of the importance of their role in that field and the references made to them, for instance, in the 1982 United Nations Convention on the Law of the Sea.

51. There remained, however, the question of the further obligations incumbent on the State of origin. Was it under an obligation to hold consultations or also to conclude an agreement? According to the formulation of draft article 16, and as reiterated by the Special Rapporteur in his oral introduction (2108th meeting), an obligation to "negotiate a régime" was involved. That was obviously more than an

[14] *International Legal Materials* (Washington, D.C.), vol. XXVII (1988), p. 868.

obligation to hold consultations or even to negotiate: it was an obligation to conclude an agreement. But that kind of obligation differed from the rule of general international law whereby States were required to settle their disputes by peaceful means, as stipulated in Article 33 of the Charter of the United Nations. The Special Rapporteur's proposal raised the question whether there existed in general international law or, more specifically, in the law governing the subject of liability an obligation of the kind he advocated.

52. In order to deal with that problem, a distinction had been drawn in the doctrine and practice of international law, and especially in environmental law, between "consultation" and "negotiation". The former involved talks between official representatives of States for the purpose of clarifying the respective points of view and, if necessary, of finding a solution or preparing negotiations, while the latter involved formal deliberations conducted with a view to the conclusion of an agreement. The difference was particularly evident in the annex to recommendation C(74)224 on "Principles concerning transfrontier pollution" adopted by the Council of OECD in 1974 (A/CN.4/423, para. 85), which provided only for an obligation to hold consultations. Moreover, all the instruments cited by the Special Rapporteur in illustration of State practice (*ibid.*, paras. 80 *et seq.*), as well as others which he did not cite, provided for an obligation to hold consultations, not to negotiate. That also applied to recently adopted conventions and conventions still in preparation. In other words, the obligation laid down in draft article 16 went well beyond the obligations currently incumbent on States and, if it were treated as a condition for the pursuit of the activities to be covered by the future instrument, it would certainly impair the chances for ratification of that instrument.

53. With regard to the last issue he wished to raise, namely the applicability of the proposed procedure to existing activities, the Special Rapporteur had pointed out that, although such activities were covered in draft article 10 by the reference to an activity which "is being, or is about to be, carried on", chapter III of the draft was actually formulated with a view only to planned activities. The Special Rapporteur also sought the Commission's views on whether the procedure provided for should be modified to take account of existing activities, stating that, in his view, such changes would be minor (*ibid.*, para. 119).

54. The differences between planned and existing activities, however, and still more between activities involving the risk of an accident and activities actually causing permanent harm, were far-reaching and could warrant different procedures requiring changes that were far from being "minor". Consequently, he would suggest that, for the time being, the procedure in chapter III should be applied only to planned measures and be confined to a provision of a general nature.

55. Turning to the texts of the draft articles, he reiterated that the reference in article 1 should be to "significant risk" and "significant harm" and that the possibility of including a list of such activities should be left open.

56. Draft article 2 did not adequately reflect the changes introduced by the Special Rapporteur in the scope of the draft. Since both activities involving risk and activities causing permanent harm were now covered, those two categories obviously had to be defined separately. Accordingly, instead of laying down three definitions of risk in that article, it would be better to speak of activities involving significant risk of causing significant harm through an accident and of activities causing significant transboundary harm, meaning ongoing activities, and to define the two types of activities. He noted in that connection that the word "accident" was used for the first time in draft article 7 but had not been introduced or explained before.

57. Draft article 2 (*b*) qualified both categories as "activities involving risk", which was obviously incorrect since an activity which caused permanent harm no longer involved the "risk" of doing so because it had actually caused such harm.

58. He supported the elimination of the term "attribution" from draft article 3, for that pointed to the lawful nature of the activities covered by the draft. However, the article raised the problem of presumption. The State of origin was presumed to know or have "means of knowing" what was happening in its territory or in other places under its jurisdiction or control. That presumption should depend not only on quantitative criteria such as the number and type of vessels and aircraft available in relation to the areas to be monitored, as the Special Rapporteur suggested (*ibid.*, para. 37), but also on qualitative factors such as the availability of technology, which was of special relevance to developing countries. It might not be so easy, therefore, for a State to prove that it had no means of knowing. Moreover, as formulated, the presumption would work against the territorial State but not against a State having control over a transnational corporation operating outside its territory, since the reference to "jurisdiction or control" was limited to the "territory" or "other places". Furthermore, if the presumption was to be retained, good reasons should be given: it could not be taken for granted. As the ICJ had held in its judgment in the *Corfu Channel* case, the mere fact of the control exercised by a State over its territory and waters did not necessarily mean that it knew of any unlawful act perpetrated therein: such control did not in itself give rise to the responsibility of the State.[15]

59. Draft article 7, on co-operation, implied that the State of origin and the affected State should join efforts in combating transboundary pollution or the risk thereof. The reference it now contained to international organizations was timely and useful. The article therefore deserved support.

60. Draft article 8 likewise deserved support. As worded, however, it seemed to limit the obligation in question to the prevention or minimizing of the risk of harm, whereas it should also provide for the obligation to minimize actual harm. Furthermore, articles 8 and 9 rightly referred to any activity, whether undertaken by private or State entities, whereas most internationally agreed liability régimes provided for the liability of the operator. He wondered to what extent that should be reflected in those two articles.

61. Draft article 9 stressed the special nature, under the present topic, of reparation, which was concerned not with cessation and restitution but with restoring the balance of interests. The Special Rapporteur had found a form of wording that was flexible enough to allow for different forms of reparation in accordance with the diverse nature

[15] *I.C.J. Reports 1949*, p. 18.

of the activities covered by article 1, and had rightly stressed that reparation would have to be the subject of negotiation between States.

62. In draft article 10, which dealt with the bulk of the obligations of the State of origin, the reference to existing activities or activities "being . . . carried on" should be placed between square brackets or deleted until the Commission had established a procedure for such activities.

63. Draft article 11 provided for a procedure for protecting national security or industrial secrets. It was a traditional provision, of the kind adopted by the Commission in the draft articles on the law of the non-navigational uses of international watercourses,[16] and similar provisions were to be found in such instruments as the 1982 United Nations Convention on the Law of the Sea and the annex to the 1974 OECD recommendation to which he had already referred (para. 52 above). It would be useful to follow those provisions and adapt the wording of article 11 to them by deleting the reference to "procedure" in the title and, instead of granting the State of origin the right to invoke reasons of national security, simply to stress that nothing in the present articles would prejudice the right of that State to protect sensitive information.

64. Draft articles 13 and 14 did not call for any comment except to note that they referred to the "potential effects" of an activity, which was an indication that they were indeed directed at planned activities and not at existing activities.

65. Draft article 15 provided for the case in which, in the absence of a reply to notification, the legal régime proposed by the State of origin became operative. It was a reasonable solution. However, the rights of the potentially affected State should perhaps not be unlimited, since it could re-evaluate its position and put forward claims at a later stage. There was therefore a need to formulate some form of estoppel to enable a State of origin which received no reply to continue its activity without fear.

66. On the whole, articles 13 to 15 were based on a bilateral approach, as Mr. McCaffrey had pointed out, and further consideration should be given to whether they would be appropriate in the event of an accident causing widespread harm or in the case of creeping pollution, the effects of which were difficult to localize. The procedure envisaged in chapter III of the draft demonstrated, on the whole, how difficult it was to deal with ultra-hazardous activities and permanent transboundary harm at the same time.

67. Draft article 16 raised the problem to which he had already referred of the difference between the obligation to negotiate and the obligation to hold consultations. Consultations could, of course, lead to an agreed legal régime governing the activity in question, but it would be too inflexible to impose an absolute obligation on all States parties to conclude an agreement on all activities referred to in article 1. As to the two alternative texts proposed by the Special Rapporteur in paragraph 1, they seemed to complement each other rather than to be mutually exclusive.

[16] See article 20 (Data and information vital to national defence or security) of the draft articles on international watercourses, provisionally adopted by the Commission at its previous session (*Yearbook . . . 1988*, vol. II (Part Two), p. 54).

68. Mr. BEESLEY said that he wished to draw attention to a book by the eminent jurist, Jan Schneider.[17] It contained an excellent analysis of the distinction between strict liability and absolute liability[18] and also some very good passages—which he quoted—on notification procedure, with many examples taken from recent conventions.[19] Some of the precedents cited might allay fears over the idea of creating a precedent for an obligation to negotiate. The same author provided authoritative quotations (rather than interpretations) from the *Trail Smelter*, *Lake Lanoux* and *Corfu Channel* cases.[20]

The meeting rose at 12.30 p.m.

[17] J. Schneider, *World Public Order of the Environment: Towards an International Ecological Law and Organization* (University of Toronto Press, 1979).

[18] *Ibid.*, pp. 163-164 and 168.

[19] *Ibid.*, pp. 52-53.

[20] *Ibid.*, pp. 48-50 *et passim*.

2112th MEETING

Tuesday, 6 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,[1] A/CN.4/413,[2] A/CN.4/423,[3] (A/CN.4/L.431, sect. B)[4]

[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

[1] Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

ARTICLES 1 TO 17[5] (*continued*)

1. Mr. CALERO RODRIGUES commended the Special Rapporteur on his very useful fifth report (A/CN.4/423) on a most difficult topic, a report which would undoubtedly help to ensure that the Commission's work on the subject was conducive to good results. Because it contained 45 pages of tight legal reasoning and only one section (in the general comments on articles 10 to 12) dealt with international practice (*ibid.*, paras. 79-95), the report required in-depth analysis. Members had been given insufficient time to study it and he earnestly hoped that some of the issues raised would be left over for the next session.

2. Many points called for in-depth discussion, which was not possible under the circumstances. He would confine his remarks on the report itself at the present stage to two of those points, by way of example, and would comment only on the articles proposed. The first remark concerned the distinction drawn in the report (*ibid.*, paras. 2-15) between acts and activities. The Special Rapporteur stated:

> . . . Liability is linked to the nature of the activity, and the isolated acts referred to . . . would thus not be included in the scope of the topic. In order for the régime of the present articles to apply to certain acts, those acts must be inseparably linked to an activity which . . . has to involve risk or have harmful effects (art. 1). Harm caused by isolated acts is not covered by the draft, and the dreaded absolute liability . . . is thus avoided. (*Ibid.*, para. 14.)

Thus the main purpose of the draft articles seemed to be to regulate activities through procedures to prevent possible harm; in other words, the purpose was to create a legal régime. Harm, however, could result from acts or from situations, whether or not associated with activities. Many acts or man-made situations could produce transboundary harm even if they were not related to activities. They should therefore entail liability for the harm caused and so come within the scope of the present topic. The subject-matter of the topic was the detrimental physical effects caused in one State by acts or activities carried on in another State that were not prohibited by international law and, accordingly, were not wrongful acts. The articles should therefore set out the general principle that such harm should be compensated for and lay down rules for the application of that principle.

3. The articles could also deal with the prevention of harm and with co-operation to that end. Those questions, however, should not become the more prominent aspect of the work in hand. At one point, it had seemed as though the concept of "risk" rather than the concept of "harm" would define the scope of the draft. At the present stage, "activities" should not be allowed to exclude "acts" as a source of harm. Harm could result from an activity, such as the operation of a nuclear plant. If the activity ceased and it was decided to dismantle the plant, the question would arise whether the dismantling should be regarded as an activity. And yet harm could occur as a result. Certainly no one would contend that such harm lay outside the scope of the draft and that compensation under the articles should be ruled out. No doubt the notion of acts of State should be avoided, but it was essential for the concept of activities to include acts. He for one could not accept the argument put forward in paragraph 14 of the report.

4. A second point which called for clarification was the applicability of the two régimes of causal liability and responsibility for wrongfulness, a question discussed by the Special Rapporteur in his comments on draft article 5 (*ibid.*, paras. 40-54). The Special Rapporteur presented an extensive analysis but did not offer any final conclusions and was probably inviting the Commission to indicate its own position. Clearly, the matter required far more study of the problems involved than was possible in the limited time available. He was therefore obliged to reserve his position for the time being.

5. Those observations, as well as the ones he was to make on the draft articles, were necessarily of a very preliminary nature.

6. Draft articles 1 to 9, constituting chapter I (General provisions) and chapter II (Principles) of the draft, were revised and improved versions of draft articles 1 to 10 as referred to the Drafting Committee at the previous session. The revised texts now also had to be referred to the Drafting Committee. That situation was an invitation to consider whether the Commission's usual practice of referring articles to the Drafting Committee as soon as they were presented was correct. A far more effective course would be for the Special Rapporteur to redraft articles in the light of the discussion held in plenary, and for the articles to be referred to the Drafting Committee only after they had been discussed again in plenary.

7. In draft article 1, the scope of the articles was defined better than in the previous text and now covered both harm and risk. One problem, however, was the meaning to be given to the term "activities": the definition contained in draft article 2 was not sufficient to clarify that point. Fortunately, most of the problems regarding article 1, and indeed articles 2 to 9, could be solved by suitable drafting and could therefore be left to the Drafting Committee, along with the useful proposals made by Mr. McCaffrey and Mr. Hayes (2109th meeting), which, even though they involved more than purely stylistic changes, were designed to achieve more clarity and completeness in the expression of concepts which seemed to be accepted by the Special Rapporteur and by the Commission in general.

8. He did not believe it necessary to engage in a debate in plenary to decide whether "territory" should be mentioned alongside "jurisdiction" and "control" in article 1, whether each of the definitions in article 2 was satisfactory, whether the term "assignment" should replace "attribution" in the title of article 3, to choose even between the two alternative texts proposed for article 5, or to decide whether the principle that the innocent victim of transboundary harm should not be left to bear the loss should be explicitly included in article 9.

9. The new articles 10 to 17 of chapter III of the draft (Notification, information and warning by the affected State) obviously drew on the draft articles on the law of the non-navigational uses of international watercourses, as the Special Rapporteur himself admitted. Nevertheless, the almost infinite variety of situations to be covered by the articles on the present topic meant that the transposition gave rise to serious doubts. For instance, the six-month period which, under draft article 13, the notifying State must "allow" the notified State to reply was hardly suitable in the present context. In the articles on watercourses, the

[5] For the texts, see 2108th meeting, para. 1.

notifying State had to allow the notified State a period in which to reply, but it was a waiting period: no action on the project could be undertaken; no activity could be initiated. That was not the case in the draft articles under consideration, as the Special Rapporteur himself recognized (A/CN.4/423, paras. 111-112). What, therefore, was the meaning of the six-month period? Under draft article 10, the procedural machinery would be set in motion for "an activity referred to in article 1", i.e. an activity whose physical consequences caused transboundary harm or created an appreciable risk of causing such harm. The two situations—of "harm" and "risk"—were different and it was difficult to imagine that the same procedures could be usefully applied in both cases. Specific provisions on mechanisms to prevent or minimize harm were usually set forth in specific instruments concerning specific fields of activity. The draft articles were intended to cover so many different activities that it seemed impractical, even impossible, to establish a detailed set of obligations of a procedural nature to cover all of them.

10. The Special Rapporteur stressed in his report that "one of the basic principles, perhaps the most important, on which the obligations . . . rest is the obligation to co-operate laid down in article 7" (*ibid.*, para. 76). Surely the essence of that part of the draft was the issue of prevention. Instead of embarking on the impossible task of drawing up procedural provisions on co-operation, it would be better for the articles to set out the principle of co-operation as clearly as possible and leave it to States to devise in each case, and according to circumstances, the ways in which it should apply. It was appropriate to cite once again Gilberto Amado's dictum that States were not children. They could be trusted to work out the most appropriate procedures themselves.

11. Indeed, draft articles 10 to 17 set out a very complex and very burdensome set of obligations. Under article 10, the State of origin had to "assess" the potential transboundary effects of the activity and notify other States, providing technical data and information, including information on measures taken to prevent or minimize risk and which could serve as a basis for a legal régime. It had to proceed to assessment and notification if "warned" by another State (art. 12). It had to "allow" the notified State six months to reply and, on request, provide additional information during that period (art. 13). It had to hold consultations "without delay" to establish the facts and had to enter into negotiations to establish a suitable legal régime (art. 16). It had to apply the measures and the legal régime indicated in the notification if the notified State agreed (art. 14) or did not reply (art. 15). Lastly, it had to apply the régime laid down in the articles if it had not proposed any régime and the notified State had not replied within six months (art. 15).

12. The main purpose of the procedural machinery seemed, in the final analysis, to be to create a legal régime. The Special Rapporteur gave the following explanation of that expression:

> . . . The expression "legal régime" should not be taken to mean that this will be a complex legal instrument in every case. When the situation is straightforward, it may be enough for the State of origin to propose certain measures which either minimize the risk (in the case of activities involving risk) or reduce the transboundary harm to below the level of "appreciable harm". The State of origin may, of course, also propose some legal measures, for instance the principle that it is prepared to compensate for any harm which may be caused. . . . (*Ibid.*, para. 99.)

Personally, he did not find that explanation very satisfactory. For one thing, there was no need for the State of origin to indicate that it was "prepared to compensate", since its obligation to compensate would be imposed by the provisions of the articles.

13. As he had already pointed out, the procedural articles were intended to deal with a far greater variety of situations than were the draft articles on international watercourses. That was recognized by the Special Rapporteur in his report (*ibid.*, para. 111). Clearly, draft articles 10 to 17 should be discussed in depth at the next session. Draft articles 1 to 9 could be referred to the Drafting Committee.

14. The CHAIRMAN said that he fully agreed with Mr. Calero Rodrigues about the inadequate time given to members to examine the Special Rapporteur's report. Reports should be circulated before the start of the session.

15. Mr. BENNOUNA said that, in his remarkable fifth report (A/CN.4/423), the Special Rapporteur had taken into account the Commission's discussions on a topic which had emerged as a separate item more as an outcrop from the overall subject of international responsibility than as a response to the concrete exigencies of international realities. In any case, it was too late for any doubts about the feasibility of embarking on the present topic. It would be for States at a later stage to decide whether they wished to commit themselves to the hazardous subject of international liability for injurious consequences arising out of acts not prohibited by international law. Nevertheless, it was necessary to look ahead and envisage new situations in the context of the constant upheavals which marked the present international scene. The protection of the environment, the search for a better quality of life, the greater feeling of solidarity in those matters, and the awareness of growing interdependence in the face of chaotic growth were being considered more and more in international forums. The Commission should therefore show some measure of boldness, without losing sight of the mandate actually assigned to it by the General Assembly.

16. The provisions the Commission was formulating should give more substance to the new topic of international liability for injurious consequences arising out of acts not prohibited by international law, and it was essential not to lose sight of that guiding principle, so as to avoid serious setbacks and even the possibility of failure of the whole exercise. Hence the importance of chapters I and II of the draft, containing general provisions and principles, and of the revised draft articles 1 to 9.

17. Article 1, on the scope of the draft, was of fundamental importance. Obviously, maximum clarity was essential in determining the scope of such a controversial topic. Jurisdiction took three different forms: territorial jurisdiction, functional jurisdiction, and control or *de facto* jurisdiction. The latter figured in article 1 as an alternative to jurisdiction ("or, in the absence of such jurisdiction, under its control"). However, jurisdiction and control could in fact be cumulative. A State could exercise its jurisdiction over its territory and its control over a disputed area. International judicial opinion had repeatedly stressed that liability depended in fact on the effective control exercised over an area.

18. He agreed with the Special Rapporteur's approach in making the topic revolve round the concept of transboundary harm and the risk of causing such harm. Those two aspects were closely bound up with each other for the purposes of liability, which was incurred only where harm had been caused, which in turn implied the existence of an activity involving risk. In that connection, he associated himself with other speakers who had requested that the content of draft article 2, on the use of terms, be reserved until the Commission had adopted the whole draft on first reading. The wording of some of the definitions could, of course, be simplified.

19. Draft article 3 had been introduced in order to take account of the disparities between States and the inequality regarding the means available to them to fulfil their obligation to supervise their territory. The fact remained, however, that the rule of due diligence imposed on a State the duty to provide itself with the means of knowing.

20. Draft article 4 should set forth more clearly the preeminence of *lex specialis*, i.e. special agreements which dealt with particular forms of liability for activities which were not prohibited. As already indicated, in particular by Mr. Reuter and Mr. Tomuschat (2110th meeting), the present articles would have a residual character or take the form of a framework agreement.

21. As he had stated at previous sessions, the article on prevention (art. 8) had its place in the draft, but as an element for determining the extent of the liability incurred, or rather the amount of compensation necessary in the event of harm, according as the State had fulfilled its obligations with respect to prevention in whole or in part or had completely neglected them. He maintained, however, that failure to respect such obligations could not be invoked to make the State of origin responsible for a wrongful act even in the absence of harm.

22. It would have been more logical for draft article 9, on reparation, to be preceded by a general provision laying down the principle of liability. The term "reparation" itself was certainly not appropriate since it was linked, historically, to fault. It had been suggested that it could be replaced by another term such as "compensation", which he was quite prepared to accept, although he understood that in English that term signified indemnification. In French, on the other hand, it denoted the need to find a balance, on the basis of a series of criteria, without going so far as to provide for complete indemnification for any harm suffered. That inevitably led to the concept of equity, which he preferred to that of the "balance of interests affected", which had been introduced into the article by the Special Rapporteur. It was somewhat naive to think that the balance of interests could be restored: interests, by their very nature, changed. That concept might seem fairly attractive in theory, but in concrete terms it was of little use.

23. Turning to the new draft articles 10 to 17, he was not convinced that it was appropriate to base the procedure under what was supposed to be a framework agreement—n instrument extremely broad in scope—on the draft articles on the law of the non-navigational uses of international watercourses—the scope of which was very limited—or on specific bilateral or regional conventions involving a few States with good relations between them. The proposed procedure was based on two assumptions, namely that it was possible to know in advance, first, which was or were the potentially affected State or States and, secondly, which was the State of origin. In the case of transboundary pollution, however, the States likely to be the most seriously affected were not necessarily known in advance and, since pollution could come from various sources, it was not possible to determine which was the State of origin: indeed, there could be several such States. How could a procedure based on such precise elements as, for instance, notification and reply function properly when the assumptions were so uncertain?

24. Another question calling for an answer related to the common heritage of mankind, which could also be affected by harm, in which case not one State alone was affected. Again, how could such a procedure be envisaged when the whole of the international community was concerned? It would be preferable to introduce a procedure for notification or submission of periodic reports to an expert committee, as had been done in the case of human rights and of the law of the sea and as it was planned to do in connection with the prevention of natural disasters. The committee, which could be appointed by the States parties to the future convention, would meet under the auspices of an international organization such as the United Nations or one of its competent bodies—for example, UNEP—and would examine the reports, seek information from States parties and make recommendations to a meeting of the contracting parties or to the executive head of the organization in question. It would then be for the States concerned to draw the appropriate conclusions and, if there was any dispute, to have recourse to the relevant procedure for the peaceful settlement of disputes. In that respect, he considered that the obligation of co-operation under article 7 should be institutionalized within the framework of a committee, which should not be too cumbersome and the costs of which should be borne by the States parties themselves. That would foster a spirit of solidarity among States parties without which co-operation would be a dead letter.

25. Draft article 16, on the obligation to negotiate, was unrealistic because it did not reflect the existing state of international law and presupposed that international society had achieved a sufficiently advanced degree of integration. Within integrated organizations like EEC, it might be possible for each State to negotiate legal régimes governing many of its own national activities with the other States in the organization, but that would not be possible under the terms of an instrument as broad in scope as the present draft. However, a special provision on relations between neighbouring States would have his support.

26. It should not be forgotten that States would be dissuaded from embarking on a particular activity if a report by an international organization on any harm or risk of harm that might result from that activity was made public. Publication could likewise persuade a State to adopt preventive measures and pay compensation for any harm incurred.

27. In conclusion, he would advocate a modest approach. The Commission should confine itself to provisions that would encourage, rather than compel, States to conclude specific agreements.

28. Mr. NJENGA thanked the Special Rapporteur for his outstanding fifth report (A/CN.4/423) and for his detailed

introduction (2108th meeting), which would facilitate the Commission's understanding of a complex topic. He welcomed the various provisions placed before the Commission, and in particular the revised draft articles 1 to 9, which would provide an opportunity for further refinement of the texts.

29. For the topic under consideration, he had always maintained that the Commission should have a modest goal, namely the elaboration of a draft framework agreement which was not too detailed and which would assist States in accommodating each other's legitimate interests. With the increasing sophistication of technology and the growing pressure on finite natural resources, it was becoming ever more important to ensure that the balance of interests between States was maintained. States should not be hindered in their legitimate activities, but they should not cause unreasonable injurious consequences to the rights and interests of other States, or to the international community as a whole, in carrying on those activities. Should they do so, they must be liable to take measures to mitigate those consequences and, where appropriate, to make reparation. In that connection, he agreed with the Special Rapporteur that, "in order for the régime of the present articles to apply to certain acts, those acts must be inseparably linked to an activity which . . . has to involve risk or have harmful effects" (A/CN.4/423, para. 14).

30. While he applauded the Special Rapporteur's efforts to reformulate article 1, on the scope of the draft, the reference to "other places under its jurisdiction" created considerable conceptual difficulties. Also, he was not persuaded by the explanation given (*ibid.*, para. 21) for the deletion of the word "effective" before "control"—"effective control" being a concept that was found in many multilateral and bilateral conventions. The Special Rapporteur might therefore wish to consider replacing the phrase "in the territory of a State or in other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control" by "within an area under the national jurisdiction of a State". That was a concept which had recently been defined in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal[6] (art. 2 (9)) and was broad enough to meet the needs of the topic and avoid all the legal complexities to which the Special Rapporteur had referred. He also agreed with Mr. McCaffrey's proposal (2109th meeting, para. 13) that article 1 could be amended to refer to "activities which are carried on under the jurisdiction or effective control of a State and whose operation gives rise to transboundary harm or entails an appreciable risk thereof".

31. He was unable to agree with the Special Rapporteur's explanation (A/CN.4/423, paras. 25-26) for the use of the word "appreciable". In particular, the Special Rapporteur said that he preferred to use the word "appreciable", which qualified the word "harm" in the draft articles on the law of the non-navigational uses of international watercourses, in order to underscore the similarity between the two topics. The draft on international watercourses, however, was concerned with a relatively quantifiable risk as between interdependent States linked by virtue of a common international watercourse. "Appreciable risk", according to draft article 2 (*a*) (ii) could be readily identified on the basis of the things used in the activities concerned. The amended text proposed by Mr. McCaffrey (2109th meeting, para. 14), particularly the second alternative, which referred to risk that was "discoverable upon a reasonable examination", was better. To subject all the activities of States to such a standard, with the corresponding liability, and to the requirements regarding notification, assessment and negotiation procedures under chapter III of the draft, would be unrealistic and unacceptable, since it would seriously hamper a State's freedom of action within its own territory. That did not, however, mean that a State should not be seriously concerned about the adverse consequences of any activities carried on within its territory, particularly since the first victims of such activities would be its own citizens and interests, which no reasonable State would want to prejudice.

32. The Special Rapporteur's survey of international practice (A/CN.4/423, paras. 79-95) made it clear that there was a higher threshold than "appreciable" harm. On the basis of the terms used in the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, the Convention on Long-range Transboundary Air Pollution, the 1983 Agreement between the United States of America and Mexico on co-operation for the protection and improvement of the environment in the border area, Principle 6 of UNEP's "Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States" and many other instruments, he was convinced that, if the draft articles were to command the support of the international community, the word "appreciable" would have to be replaced by "significant", "substantial" or "important", all of which denoted a higher threshold.

33. He would invite the Special Rapporteur to consider the drafting changes in article 2 suggested by Mr. McCaffrey (2109th meeting, paras. 14-16), which went a long way towards clarifying the terms defined. He also agreed fully on the need to add a reference to the environment, in which regard the international community was rightly, though belatedly, showing increasing concern: concerted international co-operation alone would prove effective.

34. He supported the replacement of the term "Attribution" by "Assignment" in the title of draft article 3. In paragraph 2, the presumption that the State of origin knew or had the means of knowing of activities in its territory was also logical, to the extent that it was a rebuttable presumption.

35. The question of the assignment of obligations raised an issue of great importance to the developing countries, namely the activities of transnational corporations. There was a growing tendency to shift responsibility for the serious adverse effect of those activities on the health and welfare of human beings and their environment from the industrialized to the developing countries. As the environmental lobbies in the developed countries had become more organized and more powerful, the Governments of those countries had been forced to introduce increasingly stringent manufacturing standards, and even to impose a total ban on substances proved to have particularly harmful after-effects. That had, of course, increased production costs, the

[6] See document UNEP/IG.80/3 (22 March 1989); reproduced in *International Legal Materials* (Washington, D.C.), vol. XXVIII (1989), p. 657.

result being that many transnational corporations, with the full knowledge and encouragement of their States of origin, had relocated their activities to developing countries, where they did not have to incorporate the latest technology and where they could continue in many instances to use materials banned in the industrialized States. Still more reprehensible was the recent growth in the nefarious trade in toxins, involving massive transboundary movement of hazardous and toxic wastes from industrialized countries to developing countries, a problem to which the recent Basel Convention (see para. 30 above) had provided no more than a partial and largely unsatisfactory solution.

36. Faced with enormous burdens of poverty, debt and external economic pressures, many developing countries were not in a position to resist something which in the short term seemed an attractive commercial proposition but, in the end, might have very severe adverse effects, on the population and the environment and also on other States. In most cases, the transnational corporations, while assuming the nationality of the developing country, remained under the effective control of the parent corporation and continued to enjoy the patronage of the industrialized country concerned. However, in the draft articles under consideration that relationship was entirely ignored, and the developing country in question would be deemed to be the State of origin of the localized transnational corporation, with all the liability for transboundary harm that that entailed. In fact, since industrial secrets were protected from abroad, the developing country might not have been able directly to assess the likelihood of such harm.

37. If the problem was merely one of drafting, he would be glad to present some proposals. However, it was a highly substantive issue which required the closest attention of the Special Rapporteur and the Commission if the draft articles were to command wide international support.

38. He would refrain from extensive comment on the articles in chapter II of the draft, which had been discussed at the previous session and to which the Special Rapporteur had made useful changes. Some minor improvements might be suggested, but could be dealt with in the Drafting Committee. However, the importance of draft article 7, on co-operation, should be emphasized for it was central to the topic. The role of relevant international organizations, some of which were explicitly mentioned in the report (A/CN.4/423, para. 61), must be given a prominent place in article 7, and in that regard the article should be worded more positively. It might be formulated, somewhat along the lines of article 242 of the 1982 United Nations Convention on the Law of the Sea, to read:

> "States and competent international organizations shall co-operate in good faith among themselves in trying to prevent any activities referred to in article 1 carried on in their territory or in other places under their national jurisdiction or effective control from causing transboundary harm."

The Drafting Committee might also wish to consider merging articles 7 and 8.

39. As to the new articles on assessment, notification and information in chapter III of the draft, a critical approach was required in order to determine whether, although based broadly on articles already provisionally adopted in the topic of international watercourses, they might not impose an unnecessarily onerous obligation on the State of origin. The two topics were similar but not identical: the topic of international watercourses had a specific character due to the nature both of the parties and of the activities concerned, whereas the present topic dealt with much more generalized situations which were ill-suited to a rigid and detailed régime. For example, draft article 10 could be read as requiring notification and the communication of information to an indeterminate number of States when the State of origin decided to undertake any activity involving the risk of transboundary harm.

40. Other articles in chapter III, such as articles 13, 14 and 15, were excessively detailed for the purposes of the modest type of framework agreement the Commission had in mind. The general thrust of the Commission's work should be to encourage States to enter into consultations and negotiations when significant adverse effects could be anticipated either by the State contemplating the activity or by any other States likely to be affected or actually affected, so as to minimize, eliminate or mitigate transboundary harm. Rigid provisions with inflexible time-limits might have exactly the opposite result, as they would tend to impose too many restrictions on freedom of action.

41. He fully endorsed draft article 16, on the obligation to negotiate where the States concerned disagreed on the nature of the activity or its effects, or on the necessary legal régime for such activity. He did, however, believe that consultations and the establishment of fact-finding machinery were not necessarily alternatives: they might, in fact, be complementary. It might even be desirable to make specific reference to the involvement of competent international organizations where necessary. Such an approach could well be the best way of ensuring that negotiations were conducted in good faith and that the balance of interests so fundamental to the protection of the rights and legitimate interests of all the States concerned was restored.

42. Mr. ROUCOUNAS said that the Special Rapporteur was to be congratulated on his fifth report (A/CN.4/423), which reflected the proposals made at the Commission's previous session and also in the Sixth Committee of the General Assembly. There was increasing international interest in the present topic and it was important to ensure that the Commission did not lag behind in making its own contribution to the growing corpus of pertinent instruments and texts, which included the OECD drafts and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,[7] to which reference had already been made. If he had any criticism to make it was that the report was perhaps too abstract and lacked examples to illustrate the nature of the activities covered by the draft articles.

43. The Special Rapporteur had introduced a new element by speaking of activities which, when repeated, could have harmful environmental effects, an approach which seemed to find some support in the General Assembly. Personally, he believed that the Commission should not abandon concepts and terminology that were well established in international law and should not invent new and unnecessary terms. For example, he still doubted whether

[7] See footnote 6 above.

the expression "appreciable risk" was sufficiently established in international practice to merit use in the draft. Also, the term "places", as used in draft articles 1, 2 and 3, should be avoided because the draft would apply to vessels: a vessel could not be regarded as a "place".

44. Regarding the scope of the draft articles, a generally accepted formula could be used, such as "persons and property under the jurisdiction or control of a State", thus avoiding a number of possible semantic difficulties which could hinder the Commission's progress. He also had reservations about the terms "areas" in subparagraph (*c*) of article 2, and about the term "objects" in subparagraph (*e*).

45. As to draft article 4, it should not be forgotten that the draft would be residual in character, and that it would not be possible until the Commission had concluded its work to determine the relationship between the present articles and other international instruments and their status *vis-à-vis* those instruments.

46. Draft article 5 raised the familiar problem of the effect of the present articles on other rules of international law. While he appreciated the Special Rapporteur's efforts to explain his position on that issue, the conceptual framework of the draft remained unclear in that respect, simply because the difficulties involved were generally acknowledged to be considerable. The Commission might find itself suggesting to the General Assembly that, if the present articles were to achieve their purpose, the Commission must go beyond the "lawful"/"wrongful" distinction and concentrate on the aspects of prevention of and reparation for transboundary harm.

47. Draft article 6 was liable to give a misleading impression with regard to sovereignty, and might be a more useful provision if it were less strongly worded. In general, he approved of the revised draft article 7, which introduced the element of co-operation with relevant international organizations.

48. Draft articles 8 and 9 would need further elaboration, since they were concerned with principles. The introductory phrase of article 9 ("To the extent compatible with the present articles"), however, still went beyond the scope of the draft. The "interdependence" alluded to in the report (*ibid.*, para. 70) might indeed be a reality of the modern world, but the Special Rapporteur was only partly correct in going on to assert that it was that interdependence which "makes us all victims and perpetrators". The purpose of the draft was to make provision for prevention and reparation, rather than to establish who was the victim and who the perpetrator. In the absence of an insurance régime for transboundary harm resulting from activities which were not prohibited, the Commission must content itself with proceeding step by step.

49. The title of chapter III of the draft, "Notification, information and warning by the affected State", did not fully reflect the chapter's content. Generally speaking, the main feature of the chapter was that it borrowed heavily from the draft articles on the law of the non-navigational uses of international watercourses. Those articles stemmed from extensive and continuing international practice embodied in a large number of relevant norms, procedures and instruments on a topic which, though related to the present one, was at the same time different. If the provisions of the draft articles on international watercourses were incorporated wholesale into the draft articles on international liability, the result might be to jeopardize what progress the Commission had achieved in the latter area.

50. It could be assumed from the wording of article 10 that the draft was not intended to cover existing activities involving risk, but that it did extend to activities which had a cumulatively harmful effect. That distinction should be brought out more clearly. He agreed with the provision in subparagraph (*a*) that each State should review activities which might cause transboundary harm, but wondered whether a State could meet the requirement in subparagraph (*b*) that it give the affected State or States timely notification of the conclusions of the review, since the State of origin was unlikely to know which States were affected. The wording of the provision should, accordingly, be less categorical.

51. Presumably, the purpose of draft article 12 was simply to afford an affected State the possibility of approaching the State of origin, i.e. to draw its attention to the activity being carried on.

52. The situation envisaged in draft articles 13 to 17 was more complex in that it assumed that the States concerned would enter into a strict legal régime. Draft article 15 established a rather strange legal system in that the primary obligation was still unspecified. By ignoring the fact that the object of the exercise was to draw up a residual régime, the Commission was proceeding towards a presumption in favour of a legal régime proposed by the alleged victim State, without, however, knowing what that régime would consist of.

53. It would be noted that draft article 16 referred to negotiations in the title, but to consultations in the text. Once again, it was necessary to avoid drawing too many parallels with the draft articles on international watercourses, in which the corresponding article[8] reflected a very different approach. With regard to negotiations as such, reference to the precedents on the subject was of necessity incomplete, and two cases in particular, *Minquiers and Ecrehos*[9] and *Delimitation of the Maritime Boundary in the Gulf of Maine Area*,[10] had introduced refinements.

54. Draft article 17 added new elements of presumption and automaticity, elements which would scarcely be acceptable for article 15. What would happen, for example, if the presumed affected State conveyed a warning, and the State of origin replied? Article 17 covered the case in which the State of origin did not reply, but not what would happen if it did. It therefore compounded the difficulties to which article 15 gave rise.

55. Lastly, the draft should include specific provisions on compensation, and they should be considered in detail.

56. Mr. AL-QAYSI paid tribute to the Special Rapporteur's efforts to guide the Commission's work on a topic which, though once of questionable viability, was now regarded as a high priority. The fifth report (A/CN.4/423) showed that the scope of the topic was broader than

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[8] Article 17 (Consultations and negotiations concerning planned measures), provisionally adopted by the Commission at its previous session (see *Yearbook ... 1988*, vol. II (Part Two), p. 51).

[9] Judgment of 17 November 1953, *I.C.J. Reports 1953*, p. 47.

[10] Judgment of 12 October 1984, *I.C.J. Reports 1984*, p. 246.

originally thought; its complexities had likewise been further compounded, and he felt that the Commission should therefore accept a measure of ambiguity in its work at the present stage.

57. Draft article 1 now encompassed activities which actually caused transboundary harm, as well as activities which created an appreciable risk of causing it. The wider scope of the article was gratifying, but the formulation should be sufficiently precise to avoid any confusion between the two kinds of activity. It would be best to deal with them separately, because their consequences were different. For the same reason, the procedural obligations arising from them must, in the subsequent articles, be differentiated accordingly.

58. He supported the amended text of article 1 proposed by Mr. McCaffrey (2109th meeting, para. 13), but had serious doubts about the use of the adjective "appreciable" to qualify "risk". As already pointed out, the texts relied upon by the Special Rapporteur used the term "significant". He was not convinced by the argument in the report (A/CN.4/423, para. 26) in favour of the term "appreciable" on the basis of harmonization between the present topic and that of the law of the non-navigational uses of international watercourses. In the fourth report by Mr. McCaffrey on the latter topic,[11] the term "appreciable" was justified more fully than in the report now before the Commission. It was, moreover, used to qualify harm alone, whereas in the present draft articles it qualified both risk and harm. Indeed, draft article 2 contained five separate uses of the word "appreciable". Moreover, in his report (*ibid.*, para. 57), the Special Rapporteur himself indicated that the threshold of tolerance for the purposes of article 6 would be set by harm which was not "insignificant", rather than by that which was "appreciable".

59. On the question whether the scope of the draft, as defined in article 1, extended to the activities of transnational corporations, much depended on how jurisdiction was understood in relation to the provisions of internal law on such corporations. According to the Special Rapporteur, private corporations shared in the duty of prevention under article 8, "and the State will have to impose and enforce the corresponding obligation under its domestic law" (*ibid.*, para. 66).

60. The formulation of draft article 2 should, as Mr. Hayes (2109th meeting) had suggested, be regarded as provisional until the first reading of the draft articles had been completed.

61. He welcomed the revised title of draft article 3, and was also prepared to accept the substance, but the formulation should be simplified. The useful proposal by Mr. McCaffrey appeared to assume that only activities involving risk were covered; hence the cross-reference to article 1 should be retained.

62. Alternative B of draft article 5 was, in his opinion, the better of the two texts submitted.

63. The co-operation with international organizations required under draft article 7 should be mandatory, since the technical expertise and impartial assistance of such organizations would be valuable to the States concerned. He would query the statement in the report that "such an obligation would not be automatic in all cases, but only in those that required it" (A/CN.4/423, para. 61). Who would decide whether a case required the assistance of an international organization? It was to be inferred from article 7 that both the State of origin and the potentially affected State must agree that such a need existed; but if they failed to agree, would the dissenting State be in breach of the obligation? If that was not the case, the text of article 7 should be amended.

64. If, as the Special Rapporteur suggested (*ibid.*, para. 63), the obligation set out in article 7 was "towards" a régime of prevention, it failed to meet the requirements of equity, since the potentially affected State was not a beneficiary of the potentially harmful activity. By contrast, draft article 8 correctly placed the burden of prevention on the State of origin. Mr. McCaffrey had rightly pointed out that the formula "the best practicable, available means" in article 8 should be explained: the power to act necessarily implied availability of the means to do so.

65. In draft article 9, the term "reparation" should be replaced by "compensation". Such compensation need not, in practice, be confined to monetary compensation; it might include the contribution made by new technologies in remedying a particular case of transboundary harm. But it could not "seek to restore the balance of interests affected by the harm" other than by putting an end to the harmful activity. Presumably, what was actually intended was an adjustment of the balance of interests.

66. In his opinion, articles 1 to 9 were not yet ready for referral to the Drafting Committee.

67. Draft article 12 could include a provision similar to that in paragraph 2 of article 18 of the draft articles on international watercourses.[12]

68. Draft articles 13 to 15 appeared to refer only to prevention of the potential effects of an activity involving risk, yet it was clear from the report (*ibid.*, para. 99) that activities actually causing harm were also covered. Hence there was a lack of consistency with articles 1 and 10, which likewise covered both types of activity. For the sake of clarity the two types of activity should be handled separately, and the substantive obligations arising from each should be specially tailored. The procedural rules set forth in the draft articles on international watercourses could not be followed too slavishly.

69. The two alternative texts proposed in draft article 16 should be treated as a two-tier obligation, and in that connection he commended the solution that had been suggested by the previous Special Rapporteur in section 2 (6) of the schematic outline.

70. In conclusion, he endorsed the practical and modest approach suggested by the Special Rapporteur (*ibid.*, paras. 119-121) for future work on the topic. However, technical advice was indispensable at the present stage and an interdisciplinary approach would help to remove many of the remaining uncertainties.

[11] *Yearbook ... 1988*, vol. II (Part One), p. 205, document A/CN.4/412 and Add.1 and 2.

[12] For the text of article 18 (Procedures in the absence of notification), provisionally adopted by the Commission at its previous session, see *Yearbook ... 1988*, vol. II (Part Two), p. 52.

71. Mr. SOLARI TUDELA said that the draft articles submitted by the Special Rapporteur essentially constituted progressive development of international law, envisaging a range of possible future situations. He agreed with Mr. Francis (2111th meeting) that the present topic was rooted in State responsibility. He recalled that, when it was first taken up in 1978, the Commission had shrunk from designating the harmful acts or activities in question as "lawful", preferring to describe them as "not prohibited by international law". The terminology was extremely important, since many of the activities bordered on unlawfulness, or might become unlawful in the future. There were acts, such as atmospheric nuclear tests, which had already made that transition, and others might follow. For example, chlorofluorocarbons were in everyday use in refrigerators and air-conditioning systems, but one of their effects was to destroy the ozone layer, which was vital to human survival, and their use was soon to be prohibited under a new international treaty. Consequently, the draft should retain the term "reparation" (art. 9), which pertained to State responsibility.

72. He agreed with the suggestions already made that the draft articles should cover the activities of multinational corporations and damage to "the commons" of mankind.

73. Draft article 1 had been properly reformulated to encompass both risk and harm. The difficulty arising with the word "control" was chiefly one of interpretation, and could be resolved in the commentary by citing examples. He maintained his view that a list of harmful activities should be included in the article itself, and would point out that EEC had recently adopted such a list.

74. Draft article 3 was acceptable, but a better title might be "General obligations". Article 4, as now drafted, appeared to contradict the principle that special agreements operated by derogation from general rules.

75. The revised article on reparation, draft article 9, reflected views expressed previously. He agreed with the explanation of the duty of prevention under article 8 given by the Special Rapporteur in paragraph 50 of his fifth report (A/CN.4/423), namely that the duty of reparation under article 9 should be quantified according to the degree of compliance by the State of origin with its duty of prevention under article 8. The process of negotiation, however, should be defined more clearly.

76. As to the procedures set out in draft article 10, a list of the activities concerned would be helpful to States. The word "serious" at the beginning of draft article 12 was unnecessary, since article 10 simply began: "If a State has reason to believe".

77. In his opinion, the draft articles could be referred to the Drafting Committee.

78. Mr. EIRIKSSON said that he welcomed the revised draft articles 1 to 9, which correctly represented the views expressed in the Commission and in the Sixth Committee of the General Assembly. What was destined to emerge from the Commission's work on the present topic was the principle that reparation should be made for significant transboundary harm. Machinery must therefore be devised to assess reparation, and measures must be prescribed to prevent or minimize the risk of such harm, without entering into too much detail. There was too much detail in draft articles 10 to 17. The Commission's next priority should therefore be to frame guidelines for negotiating reparation.

79. As to the scope of the redrafted articles 1 to 9, they should indeed cover both activities causing transboundary harm and activities creating the risk of such harm, but article 1 should draw a clearer distinction between the two. The reference to jurisdiction in article 1 could be omitted, since no departure from general international rules on the matter was involved; article 3, however, included a limitation which required the reference to areas of jurisdiction. Mr. McCaffrey (2109th meeting) had suggested extending the concept of "territory" to include extraterritorial jurisdiction, something that could certainly be done at a later stage, provided States were willing.

80. With regard to the term "appreciable", no scientific definition of transboundary harm was possible, and hence the definition attempted in draft article 2 (*a*) (ii) would be best avoided. In his view, only five of the concepts used in the draft required definition at the present stage: they were risk, the term "appreciable", transboundary harm (including "appreciable" and "continuing" harm), State of origin, and affected State. He agreed with Mr. Reuter (2110th meeting) and Mr. Bennouna that the term "reparation" should be defined to include all forms of compensation and should be distinguished from the same term as used in the context of State responsibility.

81. It was gratifying to see the new paragraph 2 of draft article 3, and also the redrafted version of article 6. Draft articles 7 and 8 should differentiate more clearly between the rules applicable to activities involving risk and those applicable to other activities causing harm.

82. He supported Mr. Hayes's proposal for the wording of draft article 9 (2109th meeting, para. 40), which would ensure protection of the innocent victim. The article must pose a clear duty to negotiate—a mere duty to consult was insufficient—and the guidelines for such negotiations must be devised as soon as possible.

83. His own drafting proposals in regard to chapters I and II of the draft were as follows:

Article 1

"The present articles apply to activities which cause transboundary harm or which create an appreciable risk of causing transboundary harm."

Article 2

"For the purposes of the present articles:

"(*a*) 'Transboundary harm' means appreciable physical harm, including continuing harm, to persons or objects, to the use or enjoyment of areas or to the environment in the territory or in areas under the jurisdiction or control of a State, hereinafter referred to as 'the affected State', which is caused by activities carried on in another State;

"(*b*) 'State of origin' means the State in whose territory or in areas under whose jurisdiction or control the activities referred to in article 1 take place;

"(*c*) 'Risk of causing transboundary harm' means the possibility of causing transboundary harm that cannot be eliminated by any reasonable precautions;"

For subparagraph (*d*), he would seek a definition of "appreciable risk" and "appreciable harm" based on a definable threshold.

Article 3

"1. The State of origin will not have the obligations set out in the present articles with respect to an activity referred to in article 1 unless it knew, or had the means of knowing, that the activity was being or was about to be carried on in its territory or in other areas under its jurisdiction or control."

Paragraph 2 of article 3 would be as proposed by the Special Rapporteur and the title would be "Limitations on applicability".

Article 6

"The exercise by a State of origin of its sovereign right to carry on or permit human activities in its territory or in other areas under its jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States."

Article 7

"1. States of origin shall co-operate in good faith with affected States in trying to prevent transboundary harm resulting from activities which create an appreciable risk of causing such harm.

"2. Where transboundary harm occurs, the State of origin shall co-operate with the affected State in minimizing its effects."

Article 8

"States of origin shall, in accordance with chapter III, take appropriate measures to prevent or minimize the risk of transboundary harm."

84. He warmly thanked the Special Rapporteur for his efforts and looked forward to a comprehensive set of articles on the topic.

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

[Agenda item 1]

85. Mr. TOMUSCHAT asked whether for the next agenda item to be considered, jurisdictional immunities of States and their property, the articles dealt with in the Special Rapporteur's second report (A/CN.4/422 and Add.1) would be discussed separately or together.

86. The CHAIRMAN said that, since the Drafting Committee needed the views of the Commission on all parts of the draft, members should not be restricted to commenting on separate articles.

87. Mr. OGISO (Special Rapporteur) said that he was willing for the Commission to proceed either with an initial general discussion or on the basis of individual articles. However, since his preliminary report (A/CN.4/415) had not been discussed at the previous session, members might wish to comment first on that report, taking up the second report at a later stage if time permitted.

88. Mr. BARSEGOV said that, if members were not ready to comment on the topic of jurisdictional immunities immediately after the introduction by the Special Rapporteur, the time saved at the next day's meeting could be used by any members still wishing to comment on the topic of international liability. The new concepts involved in the 17 revised or new articles on the latter topic warranted extra time for discussion.

89. The CHAIRMAN said that there could be no question of imposing a time-limit on speakers; however, any time saved from the next day's meeting would be needed by the Drafting Committee.

90. Mr. McCAFFREY suggested that, in order to facilitate orderly consideration, the draft articles on jurisdictional immunities of States and their property should be arranged in groups for discussion purposes. He pointed out that the preliminary and second reports on the topic were interrelated, and it was not feasible for members to deal with them separately.

91. The CHAIRMAN said that the practical problem would be resolved by consultation.

The meeting rose at 1.05 p.m.

* Resumed from the 2109th meeting.

2113th MEETING

Tuesday, 6 June 1989, at 3 p.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,[1] A/CN.4/413,[2] A/CN.4/423,[3] A/CN.4/L.431, sect. B)[4]

[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

[1] Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

ARTICLES 1 TO 17[5] (*continued*)

1. Mr. THIAM welcomed the efforts made by the Special Rapporteur to give substance to a topic that had been controversial from the start. It was true that the controversy was purely theoretical and would not stop States from using natural resources and placing the technologies available to them at the service of their activities. The Commission was nevertheless required to propose to States the rules that should govern their activities and to indicate the limits beyond which they must not go, the responsibilities they incurred and the means of settling their disputes. In order to be acceptable, those rules had to be clear, coherent, balanced and equitable.

2. He continued to believe that there was no clear-cut dividing line between the topic of State responsibility and the topic under consideration and that the two topics should have been dealt with at the same time, in a single draft. Proposals to that effect had, moreover, been made from the outset, but the fact was that responsibility had been divided into two parts and the Commission had embarked on a theoretical discussion of the underlying principles of both.

3. The Special Rapporteur was certainly trying to justify the autonomy of his topic in relation to that of responsibility for wrongful acts, but the introduction to his fifth report (A/CN.4/423) and, in particular, the part relating to the concept of risk showed that it was difficult for him not to refer at all to the concept of fault: the word itself was used repeatedly, as demonstrated by the examples he read out. He inferred that the Special Rapporteur identified risk with a kind of "original fault", which was triggered only if an accident occurred for which the person undertaking the activity was considered to be "at fault". All that sounded very much like responsibility for wrongful acts. The Special Rapporteur actually admitted (*ibid.*, paras. 40 *et seq.*) that the two types of responsibility might coexist within one and the same draft and went into a number of interesting details in discussing that possibility.

4. The question whether there really were two different types of responsibility had thus still not been answered. In that connection, it should be noted that, although the distinction between fault and risk had its origins in legal writings and case-law, the two elements derived from the same basic texts. What was being discussed now was, of course, international liability. But was it necessary for all that to seek basic differences between the two types of responsibility, since that would mean formulating specific rules on the concept of harm and the forms of reparation? Was it not significant that all the rules stated in draft articles 6 and 7 of part 2 of the draft on State responsibility (see 2102nd meeting, para. 40)—cessation of the act, *restitutio in integrum*, reparation by compensation, etc.—also applied, *mutatis mutandis*, to the topic under consideration?

5. The distinction between an "act" and an "activity" was even more delicate. An activity was a series of acts that were all linked together and, even if it was lawful in itself, it could consist of one or more wrongful acts. The Special Rapporteur pointed out that some wrongful acts were inextricably linked to an activity which was not prohibited and agreed that, in such a case, the activity could continue provided that the wrongful act was discontinued. Yet if the wrongful act really was indissociable from the activity, how could the activity continue? In fact, the distinction between an "act" and an "activity" was more theoretical than real.

6. Generally speaking, the concept of activities not prohibited by international law was not sufficient to delimit the scope of the topic. To speak of "activities not prohibited" amounted to saying that whatever was not prohibited was allowed—a dangerous thing to say in law, where accuracy was of the essence; and to refer to custom or to the peremptory rules of international law was not enough to establish the distinction between what was lawful and what was wrongful. The solution of drawing up a list of the activities in question—which could be amended in the light of technological advances—therefore appeared to be called for.

7. The draft articles submitted by the Special Rapporteur embodied concepts which the Commission had already discussed at length, such as co-operation (art. 7), which had been dealt with in connection with the topic of the law of the non-navigational uses of international watercourses, and prevention (art. 8).

8. Reparation (art. 9) was a more difficult matter and he regretted that the concept had been dissociated from that of the innocent victim. On the one hand, innocent States did, of course, exist; in most cases, they were the victims of highly technical activities which they themselves did not have the means to undertake. On the other hand, however, the term "reparation" was not to be excluded, for it applied in cases where a wrongful act was committed in the context of an activity that was itself lawful and where the classical rules of traditional responsibility had to be invoked.

9. It was often said that the topic under consideration was very close to that of labour law, which offered examples of the type of situation where reparation did not cover all of the harm suffered. However, there was a danger of confusion on certain points: labour law applied in a national context, where solidarity was more pronounced, where the employer's interests were often linked with those of the worker and where everyone had a stake in the smooth operation of the enterprise. In such a case, reparation could not be based on the rules of ordinary law because account had to be taken of the need to ensure the survival of the enterprise. The same was not true of the topic under consideration, where solidarity was less strong in the regional or global context than in a bilateral situation. That was, moreover, why the regional framework would lend itself best to specific solutions. It was at the regional level that solidarity was most likely to operate, as shown by the tangible results achieved in that regard by regional organizations.

10. Bearing in mind that it was not possible to impose anything on States, but only to propose a kind of *à la carte* menu of possible solutions, the Special Rapporteur might shape the draft more along the lines of a framework agreement. A global solution, if not unattainable, still belonged to the very distant future.

11. In conclusion, he noted that, after years of work, the Commission had made no progress on the difficult topic before it, which was based on concepts that gave rise to endless controversy. That was why the proposed articles

[5] For the texts, see 2108th meeting, para. 1.

were acceptable only in so far as they said nothing new in relation to other drafts on other topics.

12. Mr. BARSEGOV said that he first wished to emphasize that the question of the liability of States for transboundary harm was relatively new. It had been separated from the topic of State responsibility on the basis of the idea that liability could derive either from a fault—the violation of an international obligation—or from a lawful activity. The formulation of rules governing strict liability as a general principle was complicated by the fact that, in international law, that type of liability was an innovation and did not derive from agreements or conventions between States.

13. The absence of a general principle of strict liability was a recognized fact. In his fourth report (A/CN.4/413), the Special Rapporteur had already noted it as an objective reality. To arrive at that conclusion had not been an easy matter. Some members of the Commission had referred to national law, had invoked precedents which sometimes had only a very remote bearing on the topic under consideration or had ignored practice which was contrary to their opinions. Others had argued that internal legal practice was not a source of international law and that those few decisions of the ICJ which had been invoked were not related to liability: thus, in the often cited *Corfu Channel* case,[6] the aim had been to define the right of innocent passage in territorial waters, not to settle the question whether a rule of strict liability existed in international law. As for the *Lake Lanoux* case,[7] it was an exception to the rule. What mattered now was to find a realistic and balanced solution that would take account of the interests of all States and of mankind as a whole.

14. The Commission's task was to lay legal foundations and identify guiding principles as a basis for conventions and treaties regulating relations between States with regard to specific activities in the case of no-fault liability. The task was difficult because regulation by way of convention was extremely limited and could not serve as a source of rules on which new principles would be based. It had been necessary to proceed by trial and error and to improvise. After years of work, the Special Rapporteur had succeeded in sketching out a concept on which agreement seemed to be taking shape. Out of concern to find a balanced solution, he himself had supported the referral of the previous draft articles 1 to 10 to the Drafting Committee at the previous session.[8] Even before the Committee had begun its work on those texts, the Special Rapporteur, influenced by some members of the Commission and some delegations in the Sixth Committee of the General Assembly, had proposed a new approach and had reworked the draft. The proposed new articles (arts. 10-17), as well as the revised versions of the previous draft articles, were based precisely on that new approach. Members of the Commission who did not agree with the new approach now had to state their views not only on the draft articles, but also on the concept upon which they were based.

15. The change of conceptual approach was evident from the start, in draft article 1. In appearance, the new concept vas a dual one. As the basis for strict liability, the Special Rapporteur was proposing not only transboundary harm resulting from an activity involving risk, but also any appreciable harm as such. The first question that arose was whether a lawful activity not involving risk could cause transboundary harm. When some members had stressed the need to draw up a list of activities involving risk, it had been stated that there were too many such activities, which were constantly increasing in number. When it came to harm as an autonomous basis for liability, however, the Commission was prepared to juggle with concepts which were difficult to define, such as "continuous", "possible", "hypothetical" or "future" harm. Members who were in favour of the new approach should therefore list the types of harm they knew of that derived from a lawful activity not involving risk. It would be seen that hardly any such activities existed, apart, according to the fifth report (A/CN.4/423), from the use of motor vehicles and domestic heating materials, and no one was sure any more exactly what was being discussed.

16. The draft had thus been modified and the basis of liability had become harm, out of any context. What was more, the so-called dualism was being presented as a compromise which took account of the different points of view. In fact, what was being imposed was a new conceptual basis which destroyed the earlier, already somewhat fragile one. A compromise could have been possible only between two reconcilable legal concepts. By trying to mix wine with oil, both were spoiled. The original concept, that of strict liability, did of course comprise the concept of harm, but as the final link in the causal chain. The new approach made harm the sole basis of such liability, thus giving it a completely different role. The two concepts were mutually exclusive. If it were agreed that, in the absence of any fault, effective harm was a source of liability without any element of risk being involved, liability based on appreciable harm would always exist, independently of risk. The only reason why the new concept did not consign the element of risk to oblivion was that to take the fact of harm as the sole basis would deprive measures for prevention of the harm of all legal foundation. How could a State be obliged to limit its lawful activities in co-operation with other States if the possibility of harm was not even postulated?

17. If harm was artificially removed from its context and taken as the sole basis for international liability, there would be no way of establishing the lawful origins of liability. To say that harm might take the form of a violation of territorial sovereignty (each State having freedom of action in its own territory as long as it did not encroach on the territorial inviolability of other States) would be to re-enter the area of responsibility for wrongful acts. He had very serious doubts about the validity of such a legal approach. The Special Rapporteur himself seemed to be aware of the problem, for he had retained the concept of risk, even though it was considerably watered down. From the legal point of view, however, it was not possible to juggle two types of liability back and forth, substituting one for the other as necessary. One or the other had to be chosen.

18. Having dealt with the legal aspects of the question, he wished to go into the "social" ones, namely those relating to the purpose of the draft articles. Speaking in the Sixth Committee on behalf of a number of advocates of the new approach which had now been adopted by the

[6] See 2108th meeting, footnote 10.

[7] See 2110th meeting, footnote 13.

[8] See 2108th meeting, footnote 5.

Special Rapporteur, one representative had stated that the crux of the matter was not liability in the narrow sense, but the principles of good faith, equity and *sic utere tuo ut alienum non laedas*. He personally did not see why a definition of strict liability which would include the element of risk necessarily had to exclude good faith, equity and the obligation not to harm others. He also did not believe that it was equitable to adopt a definition of liability under which a State that was pursuing a lawful activity without breaking the rules of international law would be treated as an enemy—for was it not true that the terms "innocent victim" and "reparation" were used as though the State of origin were guilty of a violation of international law? To refuse to regard the State of origin as an innocent victim on the same basis as the affected State was to overlook the essential difference between harm which occurred during a lawful activity and harm which resulted from an infringement of the law. In the second case, the harm was caused deliberately or as a result of criminal negligence and the State which had committed the offence or the violation, far from suffering from it, derived political, military or other advantages from it. In the first case, however, the harm was not intentional and its effects were not selective, for it was the State of origin which suffered from it first, and more than other States.

19. The new approach which now formed the basis of the draft articles was primarily the result of the fear that the concept of risk would have the effect of limiting liability: those in favour of the new approach wanted liability to extend to all harm independently of risk and thereby to solve all the problems at one fell swoop. They feared, they said, that taking risk into consideration would lead to situations where there was no longer a relationship between minimum risk and maximum harm. But was anyone suggesting that, in the evaluation of risk, only the reliability of facilities should be taken into account, to the exclusion of the extent of potential harm? He was also not convinced by the argument that only harm could be determined precisely, since risk was impossible to measure. On the contrary, it seemed to him that, if the activities covered by the draft were not listed, potential harm could not be determined without an evaluation of risk. When one spoke of an activity involving risk, one did not mean that the activity itself was the cause of the harm, but only that it introduced a heightened element of danger that might get out of control. In order for harm resulting from an accident to constitute transboundary harm, certain conditions had to be met. The probability of transboundary harm was defined both by constant geographical factors, such as the proximity of a border, and by natural factors that varied according to daily, seasonal or annual cycles, such as wind direction, the amount of precipitation, etc. A single activity could, moreover, involve differing risks depending on economic and technological conditions. Joint research carried out by interested States and organizations had led to advances in evaluation methods and, on the basis of those methods, which were now fairly sophisticated, risk and harm could be evaluated: it was possible, for example, to determine, for various locations, the amounts of pollution that were still within the limits of harm permissible for ecosystems shared by more than one State. For those reasons, he believed that the evaluation of harm and the evaluation of risk were closely linked and interdependent and that one could in no circumstances be placed in opposition to the other, as appeared to be done in draft article 1. All of the internal contradictions inherent in the new approach had to be removed and a unified and integrated approach had to be adopted, for, otherwise, no progress could be made.

20. The new approach adopted by the Special Rapporteur was naturally reflected in the texts of the other articles he proposed. He had thus lowered the threshold beyond which appreciable harm generated liability. In draft article 2 (*c*), transboundary harm was defined as follows: "Under the régime of the present articles, 'transboundary harm' always refers to 'appreciable harm'"; it would therefore be enough if harm could be recorded by detection devices for appreciable harm to have occurred. He himself believed that caution was called for in that regard and he agreed with those who thought that a specific, higher threshold must be established for liability.

21. According to the Special Rapporteur (*ibid.*, para. 56), the purpose of draft article 6 was to establish a correlation between two aspects of the concept of sovereignty (limited freedom of action with regard to lawful activities taking place in a State's territory; and limited inviolability with regard to the adverse transboundary effects of activities carried on outside a State's territory). He himself did not think that the question could be seen in terms of lawful acts, for if it were, all those relationships would be beyond the scope of the topic.

22. The entire system of international co-operation in respect of prevention of and compensation for harm both in the territory of the State of origin and in that of the affected State was based on an approach in which risk was an essential element. The Special Rapporteur retained that foundation for the special régime provided for in the draft, even though the existence of risk was no longer acknowledged as an essential element of liability. It was, however, impossible to perform a balancing act between two different approaches and, unfortunately, the balancing act collapsed on a very important matter, that of co-operation. The revised text of draft article 7 was based on the philosophy of "alienation" or opposition between the "victim" and the party that was considered, implicitly if not explicitly, to be guilty. He did not understand the reasons for deleting the well-balanced provision contained in paragraph 2 of the previous draft article 7, according to which the duty to co-operate with the affected State fell upon the State of origin and vice versa. The article now provided that that obligation existed only "in the event of harm caused by an accident", whereas, according to the concept of no-fault liability, harm was always attributable to unforeseeable circumstances in the nature of *force majeure*. The article also stipulated that the affected State would co-operate with the State of origin "if possible". No one was required to do the impossible, of course, but why should that be indicated explicitly only with regard to the affected State? It was strange that co-operation should be limited in that way in articles which, according to some members of the Commission, were intended to enunciate general principles. He was, however, glad to see that article 7 now provided for the possibility of recourse to international organizations, in view of the growing role of those organizations.

23. He would comment only generally on the new draft articles 10 to 17. Like many other members of the

Commission, he found them to be too rigid because they had been artificially transplanted from the topic of the law of the non-navigational uses of international watercourses to a very different subject-matter which corresponded on only a few points.

24. In conclusion, he said that he had not had the impression from the discussion in the Sixth Committee that a radical change in the conceptual basis for liability was required. Some delegations had not dealt with the question at all, others had suggested a new approach, and still others, including France, Guatemala, Jamaica, the Soviet Union and the United States of America, had opposed such an approach. It could not be said that one opinion had clearly dominated the others, just as such a conclusion could not be drawn from the Commission's discussion at its current session. In any event, in trying to find a solution that would reconcile all points of view, it must not be forgotten that the solution had to be based on legal theory and practice.

25. Mr. RAZAFINDRALAMBO, referring the Commission to what he had said on the concept of risk at the previous session,[9] noted that the Special Rapporteur had indicated that he was not including isolated acts, namely acts which did not form part of an activity, in the concept of an "activity" in order to avoid the problem of absolute liability. Account would, however, have to be taken of acts, such as some nuclear tests, which, although isolated, were none the less repeated at certain intervals. Mr. Calero Rodrigues (2112th meeting) had made some very pertinent comments on that subject.

26. The concept of "territory" did not seem necessary in the draft, as the concepts of "jurisdiction" and "control" would cover all eventualities: those were, in fact, the terms used in article 194, paragraph 2, and article 206 of the 1982 United Nations Convention on the Law of the Sea. He also continued to believe that it would be better to refer to "effective" control, especially when it applied to activities; the amended text of draft article 1 proposed by Mr. McCaffrey (2109th meeting, para. 13) was much clearer in that regard.

27. Since the modern-day trend was towards the economic integration of States and the abolition of customs and tax barriers, the concepts of territorial jurisdiction and control might rapidly become outdated, at least in economic terms. It would therefore be better to refer to "control over activities", which better reflected the true situation in today's world, where it was transnational corporations, not States, that controlled the major industrial and commercial enterprises. There was no justification either for the use of the expression "throughout the process", for it seemed to exclude harm which occurred after an activity had ceased. The problems referred to by the Special Rapporteur in his fifth report (A/CN.4/423, para. 32) in connection with the case where a State exercised control over a territory in violation of international law would not arise if the concepts of jurisdiction and control were applied to activities rather than to places. The population of the affected State could be protected, as the Special Rapporteur noted, by assigning jurisdiction to an international body such as the United Nations Council for Namibia. Moreover, as Mr. Beesley had suggested, the Commission should consider the possibility of regarding international agencies as "affected agencies"—for example, the International Sea-Bed Authority in respect of damage to the common heritage of mankind.

28. With regard to draft article 3, he noted that Mr. Njenga (2112th meeting) had already described the consequences it would have for developing countries. He himself would refer only to the problems raised by the presumption contained in paragraph 2. The Special Rapporteur himself acknowledged (A/CN.4/423, para. 37) that evidence to counter the presumption that the State of origin had the knowledge or means or knowing that an activity was being carried on was very difficult to establish, but then went on to use arguments that were by no means convincing to show that, in the present instance, that would not be so difficult to do. For the State of origin, evidence consisted not only in showing that it did not know or did not have the means of knowing that an activity was being carried on, but also in demonstrating that it did not know or did not have the means of knowing that such an activity was capable of causing transboundary harm: that required technological know-how that few developing countries possessed. Evidence to counter the presumption was all the more difficult in the present case because the activities in question were carried on by foreign companies and, in particular, by transnational corporations, whose interests were not necessarily the same as those of the State of origin.

29. With regard to reparation (art. 9), he again referred to the comments he had made at the previous session.[10] He would, however, suggest, in order to meet the concerns expressed by some members, and in particular by Mr. Reuter (2110th meeting), that the word "reparation", which belonged to the realm of responsibility for wrongful acts, should be replaced by "compensation", which was more neutral. Reference was made, for example, to prompt, adequate and equitable compensation in cases of nationalization, and article 235 of the United Nations Convention on the Law of the Sea also provided for "prompt and adequate compensation" in respect of damage caused by pollution of the marine environment.

30. He would make only a few preliminary comments on the new draft articles 10 to 17, which were essentially procedural provisions.

31. With regard to draft article 16, it could be asked whether the principle of the obligation to negotiate should not be included in chapter II of the draft, leaving the modalities of application in chapter III.

32. It would be difficult to impose upon the State of origin a systematic obligation to notify. In the case of existing activities, an obligation of that kind would be rather unrealistic. A transitional régime might be established or a list could be drawn up of activities for which notification would be compulsory.

33. It would be a particularly delicate task for developing countries to apply the "reason to believe" test set out in draft article 10 and to review the technical data concerning the activities being, or about to be, carried on in their territory before informing the affected State or States.

34. It was, however, primarily draft article 12, which provided for a warning by the presumed affected State,

[9] *Yearbook . . . 1988*, vol. I, p. 37, 2048th meeting, para. 43.

[10] *Ibid.*, para. 45 *in fine*.

that seemed to be theoretical in nature, at least as far as North-South and South-South relations were concerned. Moreover, when the affected States were very far away from the State of origin, as was sometimes the case, such a warning could be interpreted as an attempt to interfere in the internal affairs of the State of origin.

35. On the whole, the proposed procedural measures would be practicable only in a regional context and between countries having roughly the same technical and financial resources. If it was intended for developing countries to be able to make use of those measures, pride of place would have to be given to international technical assistance and co-operation, and provision would have to be made for a genuine compulsory mechanism of consultation with the competent international organizations, as had been done in articles 197 *et seq.* of the United Nations Convention on the Law of the Sea.

36. Mr. HAYES said that, in chapter III of the draft, the Special Rapporteur was, in accordance with the intention he had expressed at the previous session, proposing a set of provisions on the procedures to be followed to prevent the risk of harm and to remedy the harm caused, since risk and harm were, according to the revised draft article 1, the two bases for liability. He had two comments to make on those provisions.

37. First, he believed that measures for prevention and measures for reparation should be dealt with in separate articles. That might well be the Special Rapporteur's intention, since draft articles 10 to 17 did not seem to contain any provisions dealing directly with reparation. However, the introductory clause of article 10 covered all activities referred to in article 1, namely those causing harm and those involving risk of harm. It might therefore be concluded that the provisions which followed related both to measures to prevent harm and to measures to be taken in mitigation of harm. Mitigation of harm would, however, more properly find its place in draft articles relating to reparation. Even at the cost of some repetition and for the sake of clarity and logic, a careful distinction had to be drawn between the two categories of measures.

38. Secondly, if the draft articles were to serve not only as guidelines for States seeking to establish their own régime, but also as a residual régime which would apply in the absence of a specific régime, they had to strike a balance between the first two of the three principles set out in the Commission's report on its thirty-ninth session and to which he had referred earlier (2109th meeting, para. 40). Those two principles were embodied in draft article 6, which specified that: "The sovereign freedom of States to carry on or permit human activities in their territory . . . must be compatible with the protection of the rights emanating from the sovereignty of other States." He did not refer to the third principle, relating to the rights of the innocent victim, because in his view it applied more to reparation than to prevention.

39. The question arose whether the proposed measures were not too detailed, either as guidelines or as a residual régime, given the wide variety of situations to which they would have to apply. It was true, as the Special Rapporteur had indicated, that those provisions were inspired by the Commission's work on the law of the non-navigational uses of international watercourses, as well as by various authorities and instruments. Other sources could be added, particularly two instruments adopted that year: the first was a legally binding instrument, namely, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,[11] adopted on 22 March 1989 under the auspices of UNEP, and the second was a more general instrument, namely the Hague Declaration on the Environment of 11 March 1989,[12] in which the representatives of more than 20 States from all parts of the world had called for the development of new principles of international law in that field.

40. The question of the content of the procedural draft articles therefore called for in-depth consideration. Although he was convinced of the need to encourage States to adopt specific régimes, to give them guidelines for such régimes and to propose a residual régime by providing for procedures of notification, consultation, exchange of information and—contrary to Mr. Graefrath's opinion (2111th meeting)—negotiation, it was not yet clear to him what details should be included in those provisions.

41. Lastly, he had two preliminary comments on draft article 10. First, since the time factor seemed very important with regard to procedure, it might be preferable in subparagraph (*b*) to replace the word "timely" by "early", along the lines of draft article 14, which specified that the State which had been notified must communicate its findings to the notifying State "as early as possible", thus showing that the reply to the notification had to be made urgently. Secondly, subparagraph (*d*) should refer to the measures which the notifying State "is taking or proposing to take" rather than to those which it "is attempting to take".

42. He hoped that he would have an opportunity for further discussion of the extremely dense and complex provisions presented in sections IV to IX of the Special Rapporteur's fifth report (A/CN.4/423).

43. Mr. AL-BAHARNA noted with satisfaction that, in his fifth report (A/CN.4/423), the Special Rapporteur had not only revised the 10 draft articles referred to the Drafting Committee at the previous session, but also proposed eight new draft articles. He particularly welcomed the amendments to the articles that had aroused controversy in the Commission and in the Sixth Committee of the General Assembly and urged the Commission to do everything possible to arrive at a consensus on the scope and nature of the present topic so that it could make progress and thus silence the sceptics who did not believe that it served any purpose to codify the rules of international law on the topic.

44. He had always felt that the scope of the topic could not be limited to activities involving risk. In his view, there was no special reason why liability for transboundary harm caused by activities carried on under the jurisdiction of a particular State should have been excluded. He was not, however, suggesting that the "risk" factor should be dispensed with. The Commission should adopt a dual approach, making "harm" or "injury" the criterion for

[11] See 2112th meeting, footnote 6.

[12] *International Legal Materials* (Washington, D.C.), vol. XXVIII (1989), p. 1308.

liability and "risk" the criterion for preventive measures. There remained the question whether the "risk" factor should be completely excluded as a basis for liability. He had an open mind on that question, but could in principle go along with the idea that hazardous activities which carried the risk of disastrous consequences in the event of an accident should give rise to liability.

45. The Special Rapporteur, who admitted in his report that he could not "disregard the important body of opinion in the Commission which prefers not to use the concept of 'risk' as a limiting factor" and considered that "such thinking can be incorporated in the draft articles" (*ibid.*, para. 12), had proposed a revised article 1 that would be acceptable apart from certain conceptual and terminological shortcomings. The expressions "in other places under its jurisdiction as recognized by international law" and "in the absence of such jurisdiction, under its control" were rather vague. For one thing, it was difficult to know what was meant by the expression "as recognized by international law". He therefore suggested that the article should be amended to read:

> "The present articles shall apply to activities carried on in the territory of a State or in other places under its jurisdiction or control, when the physical consequences of such activities cause, or create the risk of causing, transboundary injury."

That form of wording might help to avoid controversy as to whether or not international law recognized the jurisdiction of a State in a particular case.

46. With regard to draft article 3, it seemed to him to be a deviation from the basic principles of law to make liability conditional on the fact that the State of origin knew or had means of knowing that an activity was being, or was about to be, carried on in its territory. While he was sympathetic to the Special Rapporteur's wish to safeguard the interests of developing countries, he was not certain whether that was the best way of doing so. For one thing, the condition was formulated in general terms so as to apply to all States; moreover, it would appear to narrow liability considerably. Although he had no substantive objection to its inclusion in article 3, he would like the Commission to reconsider the knowledge test. As to the change in the title of the article, he considered that the former title ("Attribution") was not appropriate and that the new one ("Assignment of obligations") was misleading. In his view, since the main purpose of the article was to establish the circumstances under which a State was liable, the article could be entitled "Proof of obligations".

47. As to draft article 4, he was not certain at the present stage whether the outcome of the Commission's work would be a multilateral convention or a sort of restatement of the law. If it were the former, the subject-matter of the article would be governed not by paragraph 2 of article 30 of the 1969 Vienna Convention on the Law of Treaties, but by paragraph 3, according to which, in the case of successive treaties, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty". That, however, was not what was stated in draft article 4, which provided that "the present articles shall apply subject to that other international agreement". If, on the other hand, the outcome of the work was not to be a multilateral convention, article 4 might not be strictly necessary.

48. He was a little puzzled by the two alternative texts of draft article 5. In his view, the explanation given by the Special Rapporteur (*ibid.*, paras. 40-54) did not put an end to the debate on the question whether the form of liability under consideration was based on fault or not. It would be better to avoid theoretical discussions and to adopt a pragmatic approach, as the arbitrators had done in the *Trail Smelter* case.[13] Neither of the proposed texts was really necessary: the matter would be best left to the general rules of international law and to the law of treaties.

49. He was in general agreement with the revised draft articles 6, 7 and 8, which were an improvement on the corresponding previous provisions, although the drafting could perhaps be further improved.

50. Draft article 9, on reparation, gave rise to some problems. As reparation was an important aspect of the legal régime being established, the Commission should examine the concept at some length. One question which arose in that connection was what range of remedies was to be included in the concept of reparation. In private law, reparation meant payment for an injury and redress for a wrong. Thus defined, reparation was probably not confined to pecuniary damages. But what forms did non-pecuniary damages take? The Commission would have to examine that issue because the acceptability of the instrument it was formulating would depend in no small measure upon the operational significance of reparation.

51. The drafting of article 9 also required improvement. The opening words "To the extent compatible with the present articles" were unnecessary; nor was there any need to refer to the "balance of interests" theory. Moreover, since the Commission was now simply enunciating the principle of reparation, it might not be necessary to specify that reparation would be "decided by negotiation". The best course would be to state the principle of reparation in as simple and direct terms as possible.

52. He welcomed the new draft articles 10 to 17 concerning, *inter alia*, notification, information, negotiation and consultations and appreciated in particular the Special Rapporteur's efforts to keep up the momentum on what was probably the most difficult topic before the Commission. Given the progress made at the previous session, it should be possible to see light at the end of the tunnel before long. As he had been unable to examine those new articles in detail, due to lack of time, his comments would be of a preliminary nature.

53. With regard to methodology, the Special Rapporteur had apparently followed the model of the corresponding provisions of the draft articles on the law of the non-navigational uses of international watercourses. While those draft articles could probably not be disregarded, they were not the best model for provisions that would apply not only in the case of pollution of international watercourses, but also in many other situations. The best course would have been to draw up a more general régime on the basis of the one provided for international watercourses. The Special Rapporteur had not done that, and was proposing a more rigid notification procedure than that envisaged under the international watercourses régime. The Commission might wish to adopt a more generalized procedure.

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[13] See 2108th meeting, footnote 9.

54. Furthermore, he did not think that the dictum of the ICJ in the *Fisheries Jurisdiction* cases, on which the Special Rapporteur had relied for the title of draft article 16 (Obligation to negotiate), applied "almost word for word" to the situations arising under the present topic, as the Special Rapporteur argued (*ibid.*, paras. 134-135). In those cases, the Court, which had been called upon to decide the relative rights of the United Kingdom and Iceland, and of the Federal Republic of Germany and Iceland, in areas of coastal sea in which the respective parties had claimed certain fishing rights, had considered it expedient to direct them to negotiate: it was by virtue of that decision that an obligation to negotiate arose. It could not, however, be inferred therefrom that there was an obligation to negotiate in cases involving transboundary risk or harm. Admittedly, States did negotiate in such cases, but that was not the same as saying that there was an "obligation" to negotiate. He therefore suggested that the title of article 16 be amended to read simply "Negotiation". Of the two alternatives texts proposed in paragraph 1, he preferred alternative A, which was simpler and would be quicker to implement than alternative B.

55. Lastly, he considered that the draft articles relating to the consequences of failure to comply with certain procedures were unduly complicated. That was particularly true of draft article 12, which provided for a warning by the presumed affected State, and draft article 15 on absence of reply to notification. He urged the Commission to review articles 10 to 17 with a view to making them less procedure-oriented. In cases of transboundary risk or injury, States must be able to act without being hampered by procedure.

56. Mr. YANKOV, expressing appreciation to the Special Rapporteur for his valuable fifth report (A/CN.4/423), said that draft article 1, on the scope of the articles, was a significant departure from the previous version, for, by establishing a link between risk and harm—the two bases of liability—it determined the general rules which were to be formulated and which would apply equally to activities involving risk and activities causing harm. Those rules should, in his view, have a triple purpose, namely to lay down guidelines to be followed by States in concluding bilateral, multilateral, regional and global agreements; to give special emphasis in those guidelines to prevention without losing sight of the question of compensation; and to make the duty of co-operation the basic starting-point, whatever the procedural rules adopted.

57. Like a number of other members of the Commission, he considered that certain expressions used in the draft were not felicitous, such as "places under its jurisdiction or control", which recurred frequently and which could be replaced by "areas under its jurisdiction or control".

58. He did not think that the revised draft article 7, on co-operation, represented any significant advance, since it contained expressions that were open to different interpretations.

59. Draft article 8, which concerned the important principle of prevention, seemed to him to be too vague and should be elaborated somewhat. To say, as the Special Rapporteur did in his report, that "States will also have to enact the necessary laws and administrative regulations to incorporate this obligation into their domestic law, and will have to enforce those domestic norms" (*ibid.*, para. 66) was to see only the national dimension of "appropriate measures" of prevention. To be effective, particularly in the case of high-risk activities and activities which might have transboundary effects, national measures of prevention should encompass international rules and standards elaborated directly by the States concerned or through the competent international organizations, as provided for in article 197 of the 1982 United Nations Convention on the Law of the Sea.

60. With regard to draft article 9, he wondered what in fact constituted the legal foundation of reparation within the framework of the present topic—reparation which, as the Special Rapporteur pointed out (*ibid.*, paras. 69-70), did not derive from responsibility for wrongfulness. The Special Rapporteur stated that such responsibility appeared to be governed by the nature of the "costs allocation" and that, accordingly, it should seek to restore the "balance of interests" affected by the harm. It would then be more a case of "compensation", however, based on the principle of equity. Moreover, reparation, as understood in that context, seemed to raise several problems. For instance, how could the State of origin be determined when the injurious effect was due to multiple factors and was particularly widespread?

61. Turning to the new articles of chapter III of the draft and specifically to article 10, he said that assessment as such (subpara. (*a*)) should be the subject of a separate article, since it involved a whole series of technical operations, such as evaluation of the potential risk, surveillance, measurement, analyses and standard-setting, which had nothing to do with formalities like notification and information. It would therefore be preferable to link the provisions in subparagraphs (*b*), (*c*) and (*d*), which laid down procedural rules, with the following procedural articles, on the basis of the example of part XII, section 2, of the United Nations Convention on the Law of the Sea.

62. He agreed with a number of other members that draft articles 11 to 17 should be more concerned with the concept of co-operation and be less rigid and specific, since care should be taken not to reproduce the procedure contemplated for the law of the non-navigational uses of international watercourses. In particular, the obligation to negotiate (art.16) should be based not so much on the principle of the peaceful settlement of disputes—although that should not be ruled out altogether—as on the duty of co-operation.

63. Lastly, he said that, in his view, the draft articles required further consideration by the Commission before they were referred to the Drafting Committee.

64. Mr. KOROMA paid tribute to the Special Rapporteur for his work on a complex topic which was not unrelated to State responsibility and the law of the non-navigational uses of international watercourses and which, despite the fact that it had originally been intended to cover only space activities and nuclear energy, had developed over the years, although the Commission still did not have a very clear idea of what it should cover.

65. Like several other members, he considered that the Commission should be less ambitious. Rather than aspiring to produce a framework agreement, it should be content to formulate legal principles that could serve as guidelines for States in their bilateral and regional relations.

The object, in a nutshell, was to govern activities carried on under the jurisdiction of a State which caused transboundary harm. It could even be argued that a single article, imposing an obligation on every State not to cause injury or harm to its neighbours through its activities, would suffice.

66. Consequently, liability should have as its basis not risk—in which event the topic would be impossible to deal with, since any activity, for example the construction of a dam or a nuclear plant, involved a modicum of risk—but harm. In determining liability, it was necessary to take account, apart from risk, of such factors as causation, foreseeability and presumption of negligence (*res ipsa loquitur*) to see whether the victim had contributed to the harm caused, so as to mitigate the harshness of strict liability. He would therefore encourage the Special Rapporteur to set out the criteria which took account of those elements and which could supplement those already mentioned in his fifth report (A/CN.4/423). The Special Rapporteur should also consider how liability was to be determined. Only then could the Commission deal with the procedural rules, assuming that such rules were required.

67. It had been suggested that consideration of the present topic should be extended to certain aspects of environmental law. While he conceded that there were certainly similarities between the two fields, the latter was much broader than the former, since it covered, for instance, maritime spaces, outer space, the Arctic and the Antarctic, the ozone layer, and conservation of water and other natural resources. The Commission might also wish to make environmental law a separate agenda item, which it could study with the assistance of experts. It would not be advisable, however, to make it an adjunct of the topic under consideration.

68. Lastly, it would not be advisable, in his view, to refer the draft articles to the Drafting Committee at the present stage.

The meeting rose at 6.05 p.m.

2114th MEETING

Wednesday, 7 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,[1] A/CN.4/413,[2] A/CN.4/423,[3] A/CN.4/L.431, sect. B)[4]

[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 17[5] (*continued*)

1. Mr. DÍAZ GONZÁLEZ said that, like Mr. Beesley (2110th meeting), he saw the present topic as an exercise in the progressive development of international law. The Commission must therefore be willing to study related topical issues of concern to States, precisely because its aim was to develop the law to govern certain activities, to seek to prevent the harm they might cause, and to ensure that such harm did not go unpunished.

2. However, the draft articles raised problems of legal definition and of legal methodology and language. As Mr. Reuter (*ibid.*) had said, the length of time the topic had been on the Commission's agenda did not warrant so hasty a dispatch of the draft articles as to obscure those fundamental problems. The Special Rapporteur, in attempting to define the fundamentals of the topic, had looked for a foothold and had introduced the concept of activities involving risk. Yet such activities themselves were not prohibited by international law. That was a difficulty which had to be resolved; there could be no question of merely producing a set of draft articles and leaving it to the Drafting Committee to solve the fundamental problems. In defining obligations, whether of negotiation or of prevention, the Commission must determine the purpose of those obligations and hence determine the basis of the liability involved.

3. It had been suggested that a link should be forged between the concept of risk and the concept of harm, so that liability would not be based solely on risk, and that meant devising an appropriate legal régime. In positive law, special régimes were elaborated in the context of specific agreements or conventions, perhaps under the auspices of judicial or arbitral machinery, as in the *Trail Smelter* case.[6] Reference had already been made to the conventions on the peaceful use of nuclear energy, on pollution of the seas by oil or other contaminating substances, and on space objects. In all those cases, the liability was strict liability, arising only when harm was caused, and State responsibility could be incurred only if the State had failed in its duty of diligence. Liability for risk, however, could arise only where there was no internationally wrongful act. The scope for

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[1] Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

[5] For the texts, see 2108th meeting, para. 1.

[6] See 2108th meeting, footnote 9.

applying that kind of liability was now diminishing, as States increasingly assumed new international obligations based on wrongful acts; but they had so far been manifestly reluctant to accept the principle of liability for risk arising from acts which were not prohibited.

4. The 1972 Stockholm Declaration[7] and the 1982 United Nations Convention on the Law of the Sea placed more emphasis on the duty of States to prevent pollution than on establishing a new régime of liability. Those instruments confined themselves to stating the traditional obligation of States under general international law to act with due diligence. The cases so far cited in the Commission in support of a new liability régime did not seem convincing. For example, the arbitral award in the *Trail Smelter* case based liability on negligence, a violation of the duty of due diligence. The judgment of the ICJ in the *Corfu Channel* case referred, in similar vein, to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[8] It was difficult, therefore, to accept that liability could stem from acts or activities involving risk. In that sense, he agreed with Mr. Roucounas (2112th meeting) that it would be better to describe the activities not as lawful or unlawful, but as physical activities which had caused harm.

5. It was clear that there was much uncertainty in the Commission about the aims of the draft. He was himself quite prepared to assist in producing a draft convention on the environment, but that was not the same as a draft convention to regulate activities not prohibited by international law. As to terminology, Mr. Reuter had been right to say that the term "reparation" had a very specific legal meaning and consequences which could not attach to risk, and it would be better to replace it by "compensation" or "indemnification". But a compensation régime would have to allow for cases in which the benefits from the activity in question were shared: for example, the neighbouring State might derive benefit, as well as suffer harm, from the siting of a power station.

6. The Special Rapporteur's proposals were certainly worthy of further study, but the essential theme must be further clarified before the draft articles could be referred to the Drafting Committee. Some of the difficulties would be eased by clearer drafting, and he favoured Mr. McCaffrey's proposed reformulation of draft article 1 (2109th meeting, para. 13) for that reason. But draft articles 1 to 9 required further reflection as regards substance, so as to enable the Commission to decide exactly what was to be regulated. It would certainly be premature to refer the new draft articles 10 to 17 to the Drafting Committee until the Commission had reconciled its diverging approaches to the topic itself.

7. Mr. AL-KHASAWNEH said that the Special Rapporteur's fifth report (A/CN.4/423) demonstrated his logical rigour in analysing abstract concepts and his versatility in accommodating the major trends which had emerged in the Commission's debate at its previous session and in the Sixth Committee of the General Assembly.

8. His own views on the topic's basis in international law and on its viability had been expressed at the thirty-ninth session,[9] and he did not wish to repeat them. Nevertheless, he recognized the importance of the considerations which had prompted some members of the Commission to revert to the fundamentals of the topic: the concern that the draft should be acceptable to States, an awareness of the varying degrees of recognition, in different legal systems, of its underlying concepts, and the terminology problems. Academic criticisms were no less persuasive: Brownlie had concluded that the project was "fundamentally misconceived . . . the contagion may induce a general confusion in respect of the principles of State responsibility".[10] Akehurst[11] had asserted that the failure to distinguish between the lawfulness of activities and the wrongfulness of acts committed in the course of those activities had led, especially in the field of the environment, to liability *ex delicto* being mistaken for liability *sine delicto*, simply because the activity itself was lawful. Such basic concerns were troubling and called for an answer. The Special Rapporteur could perhaps follow the example of his predecessor by engaging in a constructive dialogue on the topic, with a view to reducing the conceptual differences.

9. In his report (*ibid.*, para. 5), the Special Rapporteur introduced the concept of contingent or "conditional" fault. That was a legal fiction, and he personally doubted whether it could form a theoretical basis for liability for activities involving risk. Courts, even after harm had occurred, did not prohibit the activities in question, but merely required the payment of pecuniary compensation. Such practice did not square with the presumption that hidden fault was present all along, and that it was triggered only when the harm occurred. The concept of contingent fault also bore connotations of responsibility for wrongfulness: it should therefore be avoided, to avoid confusion with the consequences of State responsibility. A better theoretical basis for no-fault liability, if one were needed, might be the theory of unjust enrichment, which involved a compensatory régime based on notions of cost-allocation. That theory was indeed mentioned, albeit indirectly, in the report (*ibid.*, para. 70).

10. The Special Rapporteur argued that polluting activities causing appreciable transboundary harm should be covered by the draft, since "general international law did not impose a prohibition which might exclude them from the topic" (*ibid.*, para. 10). That argument did not seem a valid one. There was ample authority in support of the countervailing argument that, when there was a certainty of appreciable transboundary harm, State responsibility must be involved. Handl had stated:

> . . . where States intentionally discharge pollutants in the knowledge that such discharge is bound to cause, or will cause with substantial certainty, significant harmful effects transnationally, the source State will clearly be held liable for the resulting damage. The causal conduct will be deemed internationally wrongful.[12]

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[7] *Ibid.*, footnote 6.

[8] *Ibid.*, footnote 10.

[9] *Yearbook . . . 1987*, vol. I, pp. 163 *et seq.*, 2019th meeting, paras. 55-59, and 2020th meeting, paras. 1-26.

[10] I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), p. 50.

[11] M. B. Akehurst, "International liability for injurious consequences arising out of acts not prohibited by international law", *Netherlands Yearbook of International Law, 1985* (The Hague), vol. XVI, p. 3.

[12] G. Handl, "Liability as an obligation established by a primary rule of international law: Some basic reflections on the International Law Commission's work", *ibid.*, pp. 58-59.

In his own view, responsibility would also be involved if gross negligence could be proved.

11. The report (*ibid.*, paras. 6-7 and 12-14) spoke of the need to avoid the "dreaded" concept of "absolute liability". That was why, in his fourth report (A/CN.4/413), the Special Rapporteur had introduced the concept of activities involving risk. In the fifth report, however, he noted that an "important body of opinion in the Commission . . . prefers not to use the concept of 'risk' as a limiting factor" (A/CN.4/423, para. 12). He had therefore reintroduced the concept of liability for harm, while avoiding absolute liability by excluding harm caused by a single act. Yet liability for activities was, surely, liability for risk under a different name, a conclusion warranted by the statement in the report that "liability is linked to the nature of the activity" (*ibid.*, para. 14). Moreover, both individual acts and acts which formed part of an activity gave rise to harm from the point of view of the innocent victim. There could be no justification for distinguishing between an act which formed an intrinsic part of an activity and an isolated act; nor would it be possible to determine, other than in an arbitrary manner, that an act was not intrinsically part of an activity.

12. As the Special Rapporteur rightly pointed out (*ibid.*, para. 50), by comparison with a régime of liability for wrongfulness a causal or strict liability régime would be the least harsh solution for the State of origin. The differences between strict and absolute liability were essentially differences of degree: the latter involved fewer exonerations and fewer intervening factors in the chain of causation. The absolute liability régime was to be found in many multilateral treaties on specific subjects. In a review of those treaties, Goldie had concluded that "a more rigorous form of liability than that usually labelled 'strict' is now before us, especially in the international arena".[13] For that reason, he himself could not agree with the Special Rapporteur's comment that absolute liability "would require a degree of solidarity found only in societies far more integrated than the present-day community of nations" (*ibid.*, para. 4).

13. It was demonstrated elsewhere in the report (*ibid.*, paras. 40 *et seq.*) that a régime of strict liability could well coexist in the same instrument with a régime based on wrongfulness, whether the obligations in the latter case were obligations of conduct or obligations of result. He was not sure, however, whether the standard of strict liability to be found in other international agreements on the same subject-matter within the meaning of draft article 4 could coexist with the less rigorous obligations enunciated in the present draft articles. Because article 4 waived the rule of *lex specialis*, the obligations contained in such agreements could be diluted if the States parties were also parties to the present articles. If that were to happen at a time of increasing awareness of the importance of environmental questions, the Commission's reluctance to admit a standard of absolute liability would be a step backwards.

14. The use of the same adjective, "appreciable", to describe both risk and harm was a source of confusion, since on a risk *scala* it meant detectable or foreseeable, by comparison with hidden or imperceptible risk. That interpretation was borne out by draft article (2) (*a*) (ii). A better word might be "detectable". However, on a harm *scala* the word "appreciable" clearly implied a point between minimal and massive and it would be much less confusing to replace it by "significant", which was more in keeping with relevant instruments, including recent ones.

15. As to the procedural obligations in chapter III of the draft and their enforceability, the comparable provisions in the draft articles on the law of the non-navigational uses of international watercourses were based on the assumption that such a watercourse was a self-contained ecosystem and that watercourse States could be easily identified "by simple observation in the vast majority of cases".[14] No such identification was possible under the present draft articles, with their vast scope both *ratione materiae* and *ratione personae*. Since neither the affected State nor the State of origin would be readily recognizable in all cases, it was difficult to see how the procedural duties of notification, for example, could be applied. In that connection, he welcomed the reference in the draft to international organizations, which could play an important role, both by helping States to fulfil their obligations of prevention and in the task of fact-finding and facilitating the establishment of a compensatory régime. The bilateral nature of the procedural obligations would have to be modified to allow for more direct participation by international organizations.

16. On the question of postponing or not postponing the initiation of new activities, he disagreed with the Special Rapporteur (*ibid.*, para. 112) that priority should be given to freedom of action. It must be remembered that, once appreciable physical harm had occurred, it would probably be beyond reparation, since an irreversible situation could have been created. To pay pecuniary compensation for past errors might satisfy the affected State, but could do little to alleviate damage to the environment. Moreover, the existence of the new activity would be a *fait accompli*, hindering the States concerned in their efforts to arrive at a specific régime. In the *Nuclear Tests* cases, the ICJ had ordered interim measures of protection, calling on the French Government to "avoid nuclear tests causing the deposit of radioactive fall-out"[15] on the territories in question. It went without saying that, since the orders had not related to the merits, they had been without prejudice to the lawfulness or otherwise of the activity in question. Postponement of a new activity was also more in keeping with an old principle of Islamic law, which had been codified in article 30 of the Ottoman Civil Code as "The avoidance of harm has primacy over the acquisition of benefits", *Dar'ul mafacidi awla min jalb'il manafi'i* (درء المفاسد أولى من جلب المنافع).

17. As far as the duty to negotiate was concerned, negotiations might indeed be necessary, especially in a field where the lawfulness of the activities did not lend itself to hard and fast rules, but they were no substitute for substantive rules.

18. Commenting on the draft articles themselves, he wondered whether the phrase "throughout the process", in

[13] L. F. E. Goldie, "Concepts of strict and absolute liability and the ranking of liability in terms of relative exposure to risk", *ibid.*, p. 194.

[14] *Yearbook . . . 1987*, vol. II (Part Two), p. 26, para. (2) of the commentary to article 3 (Watercourse States).

[15] *Nuclear Tests (Australia* v. *France) (New Zealand* v. *France), Interim Protection*, Orders of 22 June 1973, *I.C.J. Reports 1973*, pp. 99 and 135, at pp. 106 and 142.

article 1, meant that risk or harm during part of the process was excluded. The same query arose in relation to draft article 2 (*a*) (i) and (*b*). Both articles warranted reformulation. Careful drafting would also resolve the problem of multinational corporations and should take into account the questions of joint and of corporate liability.

19. The new title of draft article 3, "Assignment of obligations", would avoid confusion with imputability in the matter of responsibility for wrongfulness. The revised draft article 6 appeared to be a better reflection of the maxim *sic utere tuo ut alienum non laedas* than did the previous text, which had recognized the protection of others only in relation to activities involving appreciable risk.

20. The requirement in draft article 7 that co-operation be in good faith was redundant, since co-operation in bad faith was a contradiction in terms. The modalities of co-operation should be set out in the language of similar provisions in the 1982 United Nations Convention on the Law of the Sea, particularly articles 202 and 197.

21. With regard to draft article 8, he recalled Mr. Riphagen's remark that, in linear logic, one could not speak of the duties of prevention and minimization. Since matters of liability and responsibility would be predicated upon whether the duties in question had been fulfilled, it was important to explain the meaning of the words "prevent" and "minimize".

22. As to draft article 9, the term "compensation" was certainly more appropriate than "reparation" in the matter of liability for non-prohibited activities. He wondered whether the special régime yet to be elaborated would encompass more than pecuniary compensation. In his view, technical assistance should also have a place in it. In addition, courts might require that the activity in question be, if not suspended, at least carried on at a reduced level: the *Trail Smelter* case[16] was just such a precedent, offering an example of what might be called "partial cessation". The reference to negotiation in article 9 could not substitute for substantive rules, as he had already noted. All the elements he had mentioned should be studied carefully with a view to including them in a compensatory régime for lawful acts.

23. Mr. BEESLEY said that the Commission was bound to adopt a problem-solving, rather than a purely theoretical, approach. Opinions were divided. Some members wanted a set of articles based on harm, whereas others would prefer them to be based on risk. It was significant that advocates on either side had adduced arguments which could be used against their view. Clearly, the subjective approach adopted by members reflected—indeed ought to reflect—the different systems of law in which they had been trained. Nevertheless, he believed that it was still possible to find some common ground. Some progress had actually already been made. The Commission was, for example, overcoming the initial difficulty of how to deal with the problem of the "global commons", whereas previously it had been maintained that it would be too complicated to address questions of liability as between States, let alone between a State and the international community as a whole. All members of the Commission were agreed, however, on the need for progressive development of the law.

24. The problem-solving approach had been advocated by Mr. Hayes, who had made an interesting suggestion (2113th meeting) to separate the two branches of the topic and formulate in two distinct chapters articles on liability without fault and articles on matters involving risk. For his own part, he had already (2110th meeting) cited precedents of arbitral tribunals finding liability without fault. For example, the decision in the *Trail Smelter* case[17] had really been based on the concept of strict liability and not on negligence. There was also an impressive body of treaty law on absolute liability for particularly hazardous activities. It was doubtful whether any rule of customary law could be said to emerge from that corpus of law. Nevertheless, the strict liability approach alone would not lead to the formulation of a coherent set of draft articles. Account must necessarily be taken of strict, or no fault, liability on the one hand, and absolute liability on the other. The latter was provided for in a series of international conventions on international responsibility for damage caused by activities that were particularly dangerous.

25. Schneider[18] had recently cited a number of international judicial and arbitral decisions based on the concept of strict liability and had also clearly shown that it was not interchangeable with the concept of absolute liability. Strict liability was based on harm, not on fault. As he himself saw it, there was either an existing or an evolving norm of strict liability for environmental injury, based on harm and not on fault. Nevertheless, it would not be advisable to lay too much stress on that point, since that would be likely to deepen the division of views in the Commission. Indeed, another author, Ian Brownlie, took the view that international law lacked a doctrine of strict liability in the absence of fault.

26. Absolute liability was imposed in straightforward terms by many multilateral conventions in respect of such matters as damage caused by nuclear installations, nuclear ships and space objects and certain kinds of oil-pollution incidents. The relevant instruments included the 1962 Convention on the Liability of Operators of Nuclear Ships, the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the 1960 Convention on Third Party Liability in the Field of Nuclear Energy, the 1971 Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material and the 1972 Convention on International Liability for Damage Caused by Space Objects.[19] Naturally, there were some differences between the various treaties with regard to such matters as exonerations, but they clearly set forth the rule of liability without fault, and not responsibility founded on risk. However, it would be wrong to say that risk—and particularly exceptional risk—was not relevant to the topic and should not be taken into account in the draft articles.

27. Faced with all those difficulties, the Commission had to find a solution and he for one felt that it was possible to do so. The discussion should continue on draft articles 10 to 17 and the Drafting Committee should work on draft articles 1 to 9 in the light both of the debate and of the

[16] See 2108th meeting, footnote 9.

[17] *Ibid.*

[18] *Op. cit.* (2111th meeting, footnote 17), pp. 164 *et seq.*

[19] References to these Conventions are given in document A/CN.4/334, annex I.

suggestions on how to handle the twin issues of risk and fault. The Commission was the body best suited to deal with problems that were perhaps old in some contexts but none the less new in terms of law-making. A great deal would no doubt need to be done to overcome the difficulties involved. As a matter of method, work should be given to the Drafting Committee, even if the Committee did occasionally report back to the Commission with unresolved problems.

28. Lastly, he drew attention to some extracts from useful precedents on liability in such matters as outer space activities and the law of the atmosphere, copies of which he had informally made available to members. He said that it was useful to be informed of relevant activities being carried on outside the United Nations.

29. Mr. MAHIOU said that it was his intention to speak on the present topic at the next session. He would inevitably speak at length, because of the importance of the Special Rapporteur's excellent fifth report (A/CN.4/423) and of the 17 draft articles submitted therein. The Special Rapporteur had brought the topic down to earth, away from the nebulous realm of theory. As a result, the Commission was now beginning to see more clearly the meaning and purpose of an extremely important subject. Meanwhile, he agreed that draft articles 1 to 9 should be referred to the Drafting Committee.

Jurisdictional immunities of States and their property (A/CN.4/410 and Add.1-5,[20] A/CN.4/415,[21] A/CN.4/422 and Add.1,[22] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING

30. The CHAIRMAN recalled that, at the previous session, the Special Rapporteur had introduced his preliminary report on the topic (A/CN.4/415),[23] in which he had analysed the comments and observations received from Governments (A/CN.4/410 and Add.1-5) on the draft articles on jurisdictional immunities of States and their property provisionally adopted by the Commission on first reading at its thirty-eighth session, in 1986. In that report, the Special Rapporteur had also proposed certain amendments to the draft articles in the light of the comments and observations of Governments. Due to lack of time, however, the Commission had been unable to consider the topic at the previous session.

31. The draft articles provisionally adopted on first reading[24] read as follows:

PART I

INTRODUCTION

Article 1. Scope of the present articles

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

Article 2. Use of terms

1. For the purposes of the present articles:

(*a*) "court" means any organ of a State, however named, entitled to exercise judicial functions;

(*b*) "commercial contract" means:

(i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;

(iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

Article 3. Interpretative provisions

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

(*a*) the State and its various organs of government;

(*b*) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(*c*) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

(*d*) representatives of the State acting in that capacity.

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

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

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

(*a*) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and

(*b*) persons connected with them.

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

Article 5. Non-retroactivity of the present articles

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

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[20] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[21] *Ibid.*

[22] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[23] See *Yearbook . . . 1988*, vol. I, pp. 260 *et seq.*, 2081st meeting, paras. 2-26.

[24] *Yearbook . . . 1986*, vol. II (Part Two), pp. 8 *et seq.*

PART II

GENERAL PRINCIPLES

Article 6. State immunity

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

Article 7. Modalities for giving effect to State immunity

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

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

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

Article 8. Express consent to the exercise of jurisdiction

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

(*a*) by international agreement;

(*b*) in a written contract; or

(*c*) by a declaration before the court in a specific case.

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

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

(*a*) itself instituted that proceeding; or

(*b*) intervened in that proceeding or taken any other step relating to the merits thereof.

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

(*a*) invoking immunity; or

(*b*) asserting a right or interest in property at issue in the proceeding.

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

Article 10. Counter-claims

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

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

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

PART III

[LIMITATIONS ON] [EXCEPTIONS TO]

STATE IMMUNITY

Article 11. Commercial contracts

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

2. Paragraph 1 does not apply:

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

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

Article 12. Contracts of employment

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

2. Paragraph 1 does not apply if:

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

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

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

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

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

Article 13. Personal injuries and damage to property

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred in whole or in part in the territory of the State of the forum and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 14. Ownership, possession and use of property

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 16. Fiscal matters

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

Article 17. Participation in companies or other collective bodies

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

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

(*b*) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.

Article 18. State-owned or State-operated ships engaged in commercial service

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purposes of this article, the expression "proceeding relating to the operation of that ship" shall mean, *inter alia*, any proceeding involving the determination of:

(*a*) a claim in respect of collision or other accidents of navigation;

(*b*) a claim in respect of assistance, salvage and general average;

(c) a claim in respect of repairs, supplies, or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

7. If in any proceeding there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 19. Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(*a*) the validy or interpretation of the arbitration agreement;

(*b*) the arbitration procedure;

(*c*) the setting aside of the award,

unless the arbitration agreement otherwise provides.

Article 20. Cases of nationalization

The provisions of the present articles shall not prejudge any question that may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to property, movable or immovable, industrial or intellectual.

PART IV

STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

Article 21. State immunity from measures of constraint

A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraint, including any measure of attachment, arrest and execution, on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] unless the property:

(*a*) is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed; or

(*b*) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.

Article 22. Consent to measures of constraint

1. A State cannot invoke immunity, in connection with a proceeding before a court of another State, from measures of constraint on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] if and to the extent that it has expressly consented to the taking of such measures in respect of that property, as indicated:

(*a*) by international agreement;

(*b*) in a written contract; or

(*c*) by a declaration before the court in a specific case.

2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under part IV of the present articles, for which separate consent shall be necessary.

Article 23. Specific categories of property

1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial [non-governmental] purposes under subparagraph (*a*) of article 21:

(*a*) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(*b*) property of a military character or used or intended for use for military purposes;

(*c*) property of the central bank or other monetary authority of the State which is in the territory of another State;

(*d*) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

(*e*) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of subparagraph (*b*) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22.

PART V

MISCELLANEOUS PROVISIONS

Article 24. Service of process

1. Service of process by any writ or other document instituting a proceeding against a State shall be effected:

(*a*) in accordance with any special arrangement for service between the claimant and the State concerned; or

(*b*) failing such arrangement, in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(*c*) failing such arrangement or convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(*d*) failing the foregoing, and if permitted by the law of the State of the forum and the law of the State concerned:

(i) by transmission by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt; or

(ii) by any other means.

2. Service of process by the means referred to in paragraph 1 (*c*) and (*d*) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Article 25. Default judgment

1. No default judgment shall be rendered against a State except on proof of compliance with paragraphs 1 and 3 of article 24 and the expiry of a period of time of not less than three months from the date on which the service of the writ or other document instituting a proceeding has been effected or is deemed to have been effected in accordance with paragraphs 1 and 2 of article 24.

2. A copy of any default judgment rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in paragraph 1 of article 24 and any time-limit for applying to have a default judgment set aside, which shall be not less than three months from the date on which the copy of the judgment is received or is deemed to have been received by the State concerned, shall begin to run from that date.

Article 26. Immunity from measures of coercion

A State enjoys immunity, in connection with a proceeding before a court of another State, from any measure of coercion requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty.

Article 27. Procedural immunities

1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State is not required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

Article 28. Non-discrimination

1. The provisions of the present articles shall be applied on a non-discriminatory basis as between the States Parties thereto.

2. However, discrimination shall not be regarded as taking place:

(*a*) where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned;

(*b*) where by agreement States extend to each other treatment different from that which is required by the provisions of the present articles.

32. He invited the Special Rapporteur to introduce his second report on the topic (A/CN.4/422 and Add.1), which the Commission was to consider together with the preliminary report.

33. Mr. OGISO (Special Rapporteur) said that it was perhaps a little too soon after the adoption of the draft articles on first reading in 1986 to arrive at a fair assessment of the views of the international community on those texts, particularly since only 29 States had so far submitted comments and observations (A/CN.4/410 and Add.1-5) and since his preliminary report (A/CN.4/415) had not given rise to any substantial comment in the Sixth Committee at the forty-third session of the General Assembly. The purpose of his second report (A/CN.4/422 and Add.1), there-

fore, was to elaborate on the preliminary report and suggest further amendments to some of the draft articles in the light of the comments and observations of Governments, with a view to facilitating the Commission's debate.

34. Referring first to part II of the draft (General principles), he said that basically the draft articles consisted of a general principle of State immunity, as laid down in article 6, and a number of exceptions or limitations to that principle, as provided for under articles 11 to 19 of part III. Although, on first reading, there had been a clear division of views in the Commission between those who favoured an absolute rule of State immunity and those who favoured a restrictive rule, it had been generally accepted that the principle of State immunity itself existed as a norm of customary international law. That conclusion had been seen as the justification for beginning the work on the topic.

35. In his preliminary report, he had not dealt in detail with judicial practice and domestic law, which had already been covered at length in the previous Special Rapporteur's eight reports.[25] In response to requests by some members of the Commission, however, he had included in his second report a brief account of recent developments in general State practice concerning State immunity.

36. One point of view which had emerged from the comments by Governments was that a State was absolutely immune from the jurisdiction of a foreign court in practically all circumstances unless it had expressly consented to submit to such jurisdiction. According to that view, absolute immunity was a norm of general international law and States which did not abide by it violated international law. In judicial practice and under domestic law, however, the doctrine of absolute immunity had gradually yielded to the doctrine of restricted immunity. The process whereby domestic courts had adopted a restrictive view was examined briefly in his second report (*ibid.*, paras. 5-9).

37. It was apparent from that brief review of State practice that the absolute theory of State immunity could no longer be said to be a universally binding norm of customary international law. It might be argued that States which had not consented to the modification of that norm could still rely on the doctrine of absolute immunity but, as the previous Special Rapporteur had pointed out in his sixth report,[26] unless the advocates of the absolute doctrine provided concrete evidence of a judicial decision allowing immunity in cases where it would have been refused in countries practising restricted immunity, the restrictive trends could not be denied in the latter countries. In other words, they could not be denied simply by enunciation of an opposing doctrine or by mere declaration of an absolute principle. A crucial fact was that the judicial practice of the States which had upheld absolute immunity had radically changed.

38. Conversely, the question arose whether, under general international law, a State was now free to deny immunity to other States as it saw fit. If the rule of State immunity was governed by international law, it could be assumed that international law included a norm whereby the freedom of States to deny immunity to other States was limited. As the problem of the extent of such a limitation had not been resolved, however, it was not possible to arrive at a precise formulation of the general consensus. Indeed, advocates of the restrictive doctrine of State immunity had proposed that acts of foreign States could be divided into two categories—acts *jure imperii* and acts *jure gestionis*—the foreign State being entitled to immunity only with respect to the first category. Unfortunately, that distinction had proved difficult to implement in practice, which was apparently one reason why those who favoured the doctrine of absolute immunity were reluctant to accept the restrictive trend. In short, there was no single, generally accepted meaning either of acts *jure imperii* or of acts *jure gestionis*, though a number of scholars supported the principle of restricted immunity. Nevertheless, in view of the clear trend towards recognition of the principle that the jurisdictional immunity of States was not unlimited, he considered that both categories of acts should be elaborated and defined in objective legal terms.

39. In his preliminary report (A/CN.4/415, para. 67), he had proposed the deletion from article 6 (State immunity) of the words between square brackets, "and the relevant rules of general international law". He had also suggested, in accordance with the proposal by the Government of Spain, that the point could be covered in the preamble to the future convention. It would not be entirely illogical, of course, given recent developments in favour of the doctrine of restricted immunity, to retain the phrase in question. The danger was that it might result in an increase in the exceptions to immunity and therefore to an undue restriction on acts *jure imperii*. If, for that and other reasons, it was agreed that the phrase should be deleted, he would propose the following new article 6 *bis* to maintain the balance between the two opposing views (A/CN.4/422 and Add.1, para. 17):

"*Article 6* bis

"Notwithstanding the provision of article 6, any State Party may, when signing this Convention or depositing its ratification, acceptance or accession, or at any later date, make a declaration of any exception to State immunity, in addition to the cases falling under articles 11 to 19, according to which the court of that State shall be able to entertain proceedings against another State Party, unless the latter State raises objection within thirty days after the declaration was made. The court of the State which has made the declaration cannot entertain proceedings under the exception to State immunity contained in the declaration against the State which has objected to the declaration. Either the State which has made the declaration or the State which has raised objection can withdraw its declaration or objection at any time."

Such an article would not be inconsistent with the current trend in State practice towards the restrictive rule of immunity and might be conducive to the formation of a precise rule of customary international law based upon regular, uniform judicial practice among States. He realized, however, that, if draft article 6 *bis* were adopted and the bracketed phrase in article 6 were deleted, article 28 might have to be reviewed.

40. Turning to part III of the draft, members would recall that the Commission had retained two alternatives for the title, namely the expressions "limitations on" State im-

[25] *See Yearbook ... 1988*, vol. II (Part Two), p. 98, footnotes 351 and 353.

[26] *Yearbook ... 1984*, vol. II (Part One), p. 16, document A/CN.4/376 and Add.1 and 2, paras. 46-47.

munity and "exceptions to" State immunity. While he did not think that the choice between the two posed any particular difficulty, it might be preferable later during the second reading to refer the matter to the Drafting Committee with the request that it make an appropriate recommendation after examining all the draft articles.

41. In connection with article 11, on commercial contracts, he recalled that, in his preliminary report, he had proposed that paragraph 2 of article 3, which concerned the determination of a commercial contract, be replaced by the text of paragraph 3 of the proposed new article 2 (A/CN.4/415, paras. 29 and 39). He had made the proposal to take account of the views of a number of Governments which disagreed with the use of the purpose criterion to determine whether certain activities should be regarded as commercial. Those Governments also felt that paragraph 2 of article 3, in particular the phrase "if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract", was vague, unduly subjective and artificial. In his view, however, the purpose criterion was particularly necessary in cases such as famine relief and should be taken into account in cases concerning the relevant contracts.

42. Nevertheless, the double criterion laid down in the paragraph in question related primarily to the nature of the contract and also to the relevant practice of a foreign State, something which would lead to uncertainties in application because "the practice of that State" would not necessarily be clear, and might thus tend towards the doctrine of absolute immunity. From a literal interpretation of the provision, it was apparent that the purpose test was to be used as a supplementary one in cases of doubt, but, as had been pointed out in the commentary,

> if after the application of the "nature" test, the contract or transaction appears to be commercial, then it is open to the State to contest this finding by reference to the purpose of the contract or transaction.[27]

43. The purpose of a contract would almost always be determined on a one-sided basis, according to the practice of the defendant State, as the United Kingdom had stated in its comments on paragraph 2 of article 3. In fact, the double criterion was designed to provide appropriate protection for developing countries in their national economic development endeavours. The need for the provision was undeniable, but a more balanced criterion could be ensured by the formula suggested for paragraph 3 of the proposed new article 2 (*ibid.*):

> "In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but if an international agreement between the States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose, that purpose should be taken into account in determining the non-commercial character of the contract."

44. He would welcome further guidance from the Commission with regard to the proposed new article 11 *bis* (*ibid.*, para. 122), since the question at issue was of crucial importance.

45. Turning to article 13, as the previous Special Rapporteur had indicated in his fifth report,[28] the relevant provisions in recent codification instruments provided for the denial of immunity for illegal acts by foreign States causing death or personal injury or damage to or loss of property. Those enactments usually required territorial jurisdiction as a limiting factor in the application of the torts exception. Accordingly, the second territorial requirement in the article could be deleted.

46. As to the question of State responsibility, the illegality of the act or omission was not determined by the rules of international law. According to the commentary to article 13 (formerly article 14), "this exception to the rule of immunity is applicable only to cases or circumstances in which the State concerned would have been liable under the *lex loci delicti commissi*".[29] In other words, the applicable law was, in principle, the law of the forum State.

47. In a celebrated and apparently exceptional case, *Letelier* v. *Republic of Chile* (1980), an action in connection with the killing of the former Chilean Ambassador to the United States of America had been brought against Chile in a United States court under section 1605 (*a*) (5) of the United States *Foreign Sovereign Immunities Act of 1976*. Chile had claimed sovereign immunity on the ground that the killing consisted of a public act of political assassination. The court, however, had decided that jurisdiction might be asserted over a foreign State for its unlawful public acts. Sometimes a State might not take up a case based on rules of State responsibility under international law for political considerations, but it could not be said that it would be more appropriate for the victim to appeal to the local court against a foreign State under the law of the forum State.

48. Furthermore, while article 13 covered physical injury to the person and damage to tangible property, it could be argued that its scope was too wide to enlist the support of a sufficient number of States in its present form. The Commission's intentions, as reflected in the commentary, were that article 13 should mainly cover accidents occurring routinely within the territory of the forum State. The article had been restored to its present form in 1984, after the previous Special Rapporteur had replaced it by a provision which had narrowed down its application to traffic accidents for which insurance coverage would normally be claimed. In any event, the Commission should reconsider the scope of the article in the light of the fact that, to date, liability cases connected with criminal offences had seldom been encountered in practice. If the scope of the article were so narrowed, draft article 6 *bis* (see para. 39 above) might become relevant as a factor of compromise.

49. Several countries, such as the United States, the United Kingdom, Singapore and South Africa currently had legislation concerning non-commercial tort. However, almost all relevant court cases prior to the enactment of such legislation had involved traffic accidents, and it was his understanding that the *Letelier* case might be the only one to which the exception of personal injury applied, resulting in non-immunity. He therefore wished to elicit the views of the Commission on the question whether, by

[27] *Yearbook . . . 1983*, vol. II (Part Two), p. 35, para. (2) of the commentary to article 3, paragraph 2.

[28] *Yearbook . . . 1983*, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1.

[29] *Yearbook . . . 1984*, vol. II (Part Two), p. 66, para. (2) of the commentary.

narrowing down the scope of article 13 to traffic accidents, it could be rendered more acceptable.

50. Some developing countries had raised objections to article 15 because it would have a detrimental effect on their economic growth and development. In general, they thought it consistent with their national interest to refrain from enacting legislation to protect industrial or intellectual property, since free reproduction of any new technological advances in their countries might be for the benefit of society as a whole. It might be argued that the protection of intellectual property rights was one of the important requirements for the expansion of world commercial activity.

51. Article 15 did not itself in any way affect the competence of a State to select and implement its domestic policies within its territory. In fact, it placed two specific territorial restrictions on the proposed exception to State immunity. First, the alleged infringement must have occurred within the territory of the forum State; and secondly, the case must involve rights protected in the forum State. Thus, under article 15, a domestic court could not be empowered to decide infringement occurring outside the territory of the forum State. In that connection, the comment by the Mexican Government on subparagraph (*a*) (see A/CN.4/415, para. 160) was particularly relevant, and provided the correct interpretation of the article.

52. In his preliminary report (*ibid.*, para. 191), he had proposed that the term "non-governmental" in article 18 be deleted. If it were retained, paragraphs 1 and 4 could be interpreted as meaning that a ship owned by a State and used in commercial service enjoyed immunity from the jurisdiction of another State. Thus, while all commercial ships in service under a State trading system might invoke immunity, commercial vessels operating under the free-market system, whether they belonged to industrially advanced States or developing States, would be subject to local jurisdiction. Such an uneven legal consequence was totally unacceptable to a significant number of States. Deletion of the term "non-governmental" would be consistent with the general trend in international conventions, such as the 1926 Brussels Convention on the immunity of State-owned vessels, the 1958 Convention on the Territorial Sea and the Contiguous Zone (art. 22) and the 1982 United Nations Convention on the Law of the Sea (arts. 31 and 32).

53. In that connection, two Governments had pointed out that it would be desirable to introduce into the draft articles the concept of segregated State property, in order to resolve problems relating to State-owned or State-operated ships in commercial service. In the light of those comments and of the need for a new provision similar to draft article 11 *bis* as proposed in his preliminary report, he suggested that the following new paragraph 1 *bis* be incorporated in article 18 (A/CN.4/422 and Add.1, para. 26):

> "If a State enterprise, whether agency or separate instrumentality of the State, operates a ship owned by the State and engaged in commercial service on behalf of the State and, by virtue of the applicable rules of private international law, differences relating to the operation of that ship fall within the jurisdiction of a court of another State, the former State is considered to have consented to the exercise of that jurisdiction in a proceeding relating to the operation of that ship, unless the State enterprise with a right of possessing and disposing of a segregated State property is capable of suing or being sued in that proceeding."

Although the wording of that paragraph differed from that of draft article 11 *bis*, no change of substance was intended, and he hoped that the necessary adjustment would be made in the Drafting Committee.

54. One Government had suggested that the Commission should consider the question of State-owned or State-operated aircraft in commercial service. As he pointed out in his second report (*ibid.*, para. 28), the matter was governed by international civil aviation treaties, including the Convention relating to the Regulation of Aerial Navigation (Paris, 1919), the Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw, 1929), the Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft (Rome, 1933), the Convention on International Civil Aviation (Chicago, 1944) and the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952). He inclined to the view that, apart from those treaties, there was no uniform rule of customary international law concerning the immunity of State-owned or State-operated aircraft. Moreover, there were few relevant legal cases which might constitute State practice. He would therefore suggest that the question of aircraft be dealt with along the lines set out in his report, in the commentary, rather than by introducing a special provision into article 18.

55. With regard to the two bracketed alternatives in article 19, the expression "civil or commercial matter" was preferable to "commercial contract". If implied consent was the rationale behind the article, there was no reason why denial of immunity in cases involving agreement to arbitrate should be linked with one of the exceptions, such as a commercial contract. Furthermore, the reference to a "civil matter" seemed to have the advantage of not excluding cases such as arbitration of claims arising out of the salvage of a ship which might not be regarded as solely commercial.

56. As to the reference to a court, article 19 used the words "before a court of another State which is otherwise competent", while the original proposal by the previous Special Rapporteur had been "a court of another State on the territory or according to the law of which the arbitration has taken or will take place" (*ibid.*, para. 33). He himself preferred the latter formulation. Although it was sometimes said that arbitration was a particular procedure of dispute settlement distinct from adjudication by a court of law, the ordinary courts had played a supportive role in arbitration. In the light of such legal practice, article 19 introduced into the draft a denial of State immunity before domestic courts in proceedings relating to arbitration, even if one party thereto was a foreign State. Of course, the modalities of that supervisory function by domestic courts might vary with the relevant rules of each legal system. Under article 19, the supervision of arbitration extended over questions connected with the arbitration agreement, such as the interpretation and validity of that agreement, the arbitration procedure and the setting aside of arbitral awards. Some domestic legislation specified that an award could be set aside for reasons of public policy. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards provided that the setting aside of an award might

be ordered only by a court of the State in which the arbitration had taken place.

57. On the question of the extent of proceedings involving the exercise of supervisory jurisdiction by a court of another State, one Government had suggested that a reference to proceedings relating to the "recognition and enforcement" of an arbitral award should be added in subparagraph (*c*) of article 19 (*ibid.*, para. 35).

58. With one exception, recent codifications did not regard the submission by a State to arbitration as a waiver of immunity from enforcement, but he had not had the opportunity to study the relevant part of the recent United States reservation in that connection. In State practice, it appeared that two conflicting views had been asserted as to whether, by entering into an agreement to arbitrate, a State could not invoke its immunity in proceedings relating to the enforcement of an award against it. In his opinion, the enforcement of arbitral awards was dealt with correctly in the draft articles, in spite of the comment by Australia suggesting the need for more explicit treatment (*ibid.*, para. 37 *in fine*).

59. If the question was approached from the point of view that an application for enforcement served no useful purpose except as a first step towards execution, the plea of State immunity would be allowed in that proceeding to obtain the preliminary order in so far as the State's consent had not been given to the jurisdiction of the courts relating to actual execution. On the other hand, if one considered that—distinguishing recognition of an award from its execution—recognition was the natural complement of the binding character of any agreement to submit to arbitration and should not be impaired by considerations of sovereign immunity, the immunity would apply to the process of execution but not to the preceding recognition of the arbitral award.

60. In that connection, the French courts strictly distinguished recognition of arbitral awards from actual execution of the awards (*ibid.*, para. 40). The method of dealing with applications to enforce arbitral awards against foreign States might be specific to France, but it would provide the Commission with useful guidance for rethinking the question. He therefore suggested that, to cover the case in which the State of the forum adopted domestic legislation admitting the same position as the French courts, the Commission could add a new subparagraph (*d*) to article 19, reading: "the recognition of the award", on the understanding that it should not be interpreted as implying waiver of immunity from execution.

The meeting rose at 1 p.m.

2115th MEETING

Thursday, 8 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/422 and Add.1,[3] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[4] ON SECOND READING (*continued*)

1. Mr. OGISO (Special Rapporteur), continuing his introduction of his second report (A/CN.4/422 and Add.1), summarized the comments and observations received from Governments on part IV of the draft articles (State immunity in respect of property from measures of constraint).

2. Although most Governments held that immunity from measures of constraint was separate from jurisdictional immunity of States, some legal experts argued that allowing plaintiffs to proceed against foreign States and then withholding from them the fruits of successful litigation through immunity from execution might put them in the doubly frustrating position of being left with an unenforceable judgment and expensive legal costs. The Swiss Government had pointed out that the draft articles departed considerably from the 1972 European Convention on State Immunity. Yet the system under the European Convention was based on the obligation of States parties to abide voluntarily by the judgments rendered against them and it would be difficult to apply the same system elsewhere in its entirety. In addition to a waiver, the United Kingdom *State Immunity Act 1978* permitted enforcement of a judgment or an arbitral award in respect of property which was in use or intended for use for commercial purposes. The United States *Foreign Sovereign Immunities Act of 1976* established a general rule of immunity from execution with a number of exceptions, all of them referring only to commercial property. The general tendency in European countries was to permit enforcement with regard to commercial property, but to deny it in the case of property designated for public purposes. Article 21 of the draft had been worded along those lines. The only point remaining for consideration was whether the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", in subparagraph (*a*), should be deleted, as a number of Governments had suggested, in order better to reflect European practice. If that suggestion was not acceptable, the addition of the words "Unless

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

[2] *Ibid.*

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

[4] For the texts, see 2114th meeting, para. 31.

otherwise agreed between the States concerned" at the beginning of the article might alleviate the difficulties of those countries which preferred the deletion of the phrase to which he had referred.

3. Article 23, paragraph 1 (*a*), related to bank accounts of a State, which were involved in many cases concerning measures of constraint. One possible view was that bank accounts were inherently commercial assets; another was that the mere future possibility of public use was sufficient to regard a bank account as immune. Both views were somewhat extreme. Monies in bank accounts under the control of a diplomatic or consular mission carried the presumption of a public purpose and therefore enjoyed immunity. However, the 1961 Vienna Convention on Diplomatic Relations did not refer specifically to the general question of bank accounts and, as it now stood, article 23, paragraph 1 (*a*), of the draft seemed to correspond fairly faithfully to customary law. The only issue remaining to be resolved was that of accounts of central banks. The British Court of Appeal had denied immunity twice in such a case, but the United States *Foreign Sovereign Immunities Act of 1976* preserved immunity from attachment and execution of property belonging to a foreign central bank or monetary authority. Taking into account the comments made by the Federal Republic of Germany and the provisions of the United States Act, he suggested that article 23, paragraph 1 (*c*), be amended to read: "property of the central bank or other monetary authority of the State which is in the territory of another State and serves monetary purposes".

4. He had already pointed out that the Commission might consider deleting article 28 if the proposed new article 6 *bis* were adopted (see 2114th meeting, para. 39). Article 28 had been criticized by some Governments as possibly giving rise to different interpretations. Moreover, the two Governments which had offered critical comments on paragraph 2 (*a*) had given two different interpretations of the phrase "applies any of the provisions of the present articles restrictively". One Government feared that the expression would be interpreted abusively to restrict the general rule of State immunity, while the other feared that it might be interpreted as restricting the application of exceptions to immunity.

5. It would be noted that paragraph 2 (*b*) of article 28 ("where . . . States extend to each other treatment different from. . .") departed slightly from article 47, paragraph 2 (*b*), of the Vienna Convention on Diplomatic Relations ("where . . . States extend to each other more favourable treatment. . ."), thus reflecting the basic difference between the two instruments. He urged the Commission to weigh the legal consequences of the provision carefully before deciding to adopt it.

6. Mr. CALERO RODRIGUES asked the Special Rapporteur to explain whether he was in fact proposing new versions of the draft articles.

7. Mr. OGISO (Special Rapporteur) said that, although most of the changes he was proposing were additions to the text, some could have repercussions on articles already adopted: for example, the adoption of the proposed new article 6 *bis* would entail the deletion of article 28, a measure which had not been proposed so far.

8. Mr. KOROMA, commenting generally on the draft articles, said that, while the legislation and examples of legal practice referred to in the second report (A/CN.4/422 and Add.1) could give the impression that the doctrine of absolute immunity had been abandoned, it still prevailed in the majority of Asian, African and Latin-American States. For a topic such as the one under consideration, it was the arguments of States, not the decisions of domestic courts, that should constitute the principal source of law. He had, moreover, requested the previous Special Rapporteur to use as his sources not only court rulings, but also the arguments presented before the courts by defendant States.

9. He would like to know whether the Special Rapporteur believed that the proposed new article 6 *bis* should replace article 6, in which case it might be asked what would remain of the principle of jurisdictional immunity.

10. Mr. OGISO (Special Rapporteur) said that he was proposing the deletion of the bracketed phrase in article 6 and the addition of article 6 *bis* to the amended text.

11. Mr. BENNOUNA said that, at the stage of second reading of the draft articles, the Commission should avoid entering yet again into a general debate which would serve no theoretical purpose and could only impede the progress of its work. What the Commission had to do now was to consider the draft articles as adopted on first reading to determine what changes should be made in them in the light of the comments made by Governments and to provide guidance for the work of the Drafting Committee, which would be called upon to produce a final text in 1990.

12. Mr. SHI said that the topic under consideration was a very sensitive one which involved the sovereignty, sovereign equality and interests of States. The previous Special Rapporteur had admitted in his second report[5] that the principle of State immunity had become firmly established in customary international law; but there were two schools of thought with regard to that principle—the school of absolute immunity and the school of restricted immunity—and each one reflected the practice of certain States, the former reflecting the practice of by far the vast majority of States. In the past few decades, there had been a trend in certain countries, particularly Western developed countries, to favour the principle of restricted sovereignty. If no compromise formula could be found to bridge the gap between the two schools of thought, the stalemate might adversely affect political and economic relations between States.

13. By way of illustration, he referred to *Jackson et al. v. People's Republic of China* (1982), a case brought before the United States District Court of Alabama which he explained in detail. A number of American citizens had, with the help of the United States *Foreign Sovereign Immunities Act of 1976*, sought redemption by the Chinese Government of bonds issued by China before 1949. The Chinese Government had indicated to the United States Government the absolute nature of sovereign immunity and rejected the service of process. Default judgment had been passed and the plaintiffs had sought to enter an order for attachment or execution proceedings, at which point China indicated to the United States Department of State that, if

[5] *Yearbook . . . 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1.

China's property in the United States were judicially attached, the Chinese Government reserved the right to take countermeasures. Following consultations between legal delegations of the two Governments and various turns of events, the case had been dismissed on the basis of the non-retroactivity of the *Foreign Sovereign Immunities Act of 1976*. Other plaintiffs in similar cases before other United States courts had withdrawn their suits. Had it not been for the restraint shown by the Chinese Government and the effective co-operation of the United States Government, the two opposing views on sovereign immunity might have had consequences difficult to predict.

14. His intent in citing that case was to demonstrate that the Commission must search for a compromise formula that would strike the proper balance between the two doctrines. It was unfortunate that the draft articles adopted on first reading were inspired mainly by the 1972 European Convention on State Immunity and the United States *Foreign Sovereign Immunities Act of 1976*. It could hardly be said that the draft articles reflected general international law or the practice of the vast majority of States. He could therefore not agree with the Special Rapporteur's statement in his second report that

> it can no longer be maintained that the absolute theory of State immunity is a universally binding norm of customary international law. However . . . the doctrine of absolute immunity is still the norm on which *States that have not consented to its modification** could rely. . . . (A/CN.4/422 and Add.1, para. 10.)

The customary rule of sovereign immunity was valid not only in relations between States that espoused the absolute doctrine, but also in relations between States in favour of the opposing doctrine. The restrictive doctrine could apply only to relations between States which advocated that doctrine. That was, however, a source of endless polemics and an accommodating attitude had to be adopted in dealing with the topic.

15. Seen from that point of view, the draft articles before the Commission would have to be improved if they were to be acceptable to the international community as a whole. The members of that community represented great diversity in political, economic, social and legal systems and stages of development. States did not simply coexist: they had to coexist in peace, harmony and good-neighbourliness, particularly in view of their economic interdependence. The draft should therefore strengthen the principle of State immunity in consonance with the sovereignty and sovereign equality of States, take into account the interests of States and adapt to their diverse economic, social and legal systems. Only if the second reading of the draft articles were so oriented could the objective of formulating the draft articles be achieved. As the Chinese Government had pointed out in its comments and observations, that objective was

> to strike the necessary balance between the limitation and prevention of abuses of national judicial process against foreign sovereign States and the provision of equitable and reasonable means of resolving disputes, thus helping to safeguard world peace, develop international economic co-operation and promote friendly contacts between peoples. . . . (A/CN.4/410 and Add.1-5.)

16. Having made those general comments and turning to specific articles, he noted that the Special Rapporteur had proposed combining articles 2 and 3 into a single article. That was an entirely acceptable solution. Paragraph 1 (*b*) of the new article 2 (A/CN.4/415, para. 29) attempted to identify what was covered by the word "State". However, the expressions "various organs of government", "political subdivisions of the State" and "agencies or instrumentalities of the State" were not defined and the explanations given in the commentary to article 3[6] did not suffice. It was a matter of importance to a number of countries, particularly the socialist countries, that State enterprises should not come under the definition of the word "State"; that should be made clear in the wording of the article.

17. Paragraph 1 (*c*) (ii) of the new article 2 was superfluous. Practice following the Second World War showed that financial transactions between Governments and foreign private financial institutions almost invariably provided for a waiver of sovereign immunity on the part of those Governments. That practice would continue irrespective of the future convention, since it provided banks and other private financial institutions with protection for their rights and interests. In the case of bonds, it also protected bondholders and enhanced the credibility of Government borrowers.

18. The purpose of paragraph 3 of the new article 2 was to determine what constituted a commercial contract by seeking a compromise between its nature and its purpose. More weight was, however, given to the nature of the contract, since, under the proposed provision, the purpose of the contract could be taken into account only if that was expressly provided for in an international agreement or contract between the parties. That was certainly a retrogression as compared with the previous text (para. 2 of former article 3).

19. Part II of the draft (General principles) codified the principle of the jurisdictional immunities of States and their property and the basic article was article 6, which affirmed the general rule of State immunity. He could accept the article as formulated only if the bracketed phrase "and the relevant rules of general international law" were deleted. Because of the words "subject to the provisions of the present articles", which came just before, there was no need for the bracketed text, which would give rise to confusion and make the entire draft meaningless. Indeed, what were the "relevant rules of general international law"? And if there were such rules, why were they not specified in the draft? The new article 6 *bis*, by which the Special Rapporteur proposed to replace that phrase (A/CN.4/422 and Add.1, para. 17), might afford a solution if the exceptions under articles 11 to 19 were reduced to a minimum.

20. Part III of the draft called for two general comments. The first was that, because of the essential nature of State immunity, the title "Exceptions to State immunity" would be more appropriate than "Limitations on State immunity". Secondly, exceptions to State immunity, though necessary in view of the present state of international relations—in particular economic and commercial relations—should be kept to the minimum that was justified by reality.

21. Article 11 provided for an exception in the case of commercial contracts. It was true that, as more and more States engaged in commercial activities, differences were bound to arise between States and foreign private persons, and the lack of legal means for settling such differences placed private individuals at a disadvantage *vis-à-vis*

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[6] *Yearbook . . . 1986*, vol. II (Part Two), pp. 13-14.

sovereign States—a situation that could only have an adverse effect on the international movement of goods, services and financial resources. It was therefore understandable that article 11 made commercial contracts an exception to State immunity, and that would be acceptable subject to a proviso reading "provided that the commercial contract has a significant territorial connection with the State of the forum", as proposed by the previous Special Rapporteur in 1983.[7] The need for such a proviso was obvious, since the words "by virtue of the applicable rules of private international law" lacked precision—quite apart from the fact that the rules of conflict of laws of States were not uniform. Even the United States *Foreign Sovereign Immunities Act of 1976* provided for such a territorial link.

22. On the other hand, in formulating the exception under article 11, account must be taken of the fact that the economic, social and legal systems of States were far from being identical. Some, for instance, attributed to the State commercial activities which others did not regard as such. It was because of that confusion that, in lawsuits, there was often a problem of choice of parties as defendants and that plaintiffs sometimes abused domestic legal procedure to make the State itself and the State enterprise concerned co-defendants in the same lawsuit on the ground of presumed identity. That was an added reason for incorporating the concept of "segregated State property", as the Special Rapporteur had done in the proposed new article 11 *bis* (A/CN.4/415, para. 122).

23. Article 11 *bis* should, however, not only define the concept of segregated State property, but also exempt foreign sovereign States from appearance before a court to invoke immunity in a proceeding concerning differences relating to a commercial contract between a State enterprise with segregated property and foreign persons. Such an exemption was also of importance to developing countries because of the exorbitantly high costs of such lawsuits.

24. In view of those considerations, he proposed, on a preliminary basis, that the new article 11 *bis* should read:

"1. If a State enterprise enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State cannot invoke immunity from jurisdiction in a proceeding arising out of that commercial contract unless the State enterprise is a legal entity separate from the State with rights of possessing, using and disposing of a definite segregated part of State property, subject to the same rules of liability relating to commercial contracts as a natural or juridical person, and for whose obligations the State is in no way liable under its domestic law.

"2. In a proceeding arising out of a commercial contract indicated in the preceding paragraph, a certificate signed by the diplomatic representative or other competent authorities of the State to whose nationality the State enterprise belongs and directly communicated to the foreign ministry for transmission to the court shall serve as definite evidence of the character of the State enterprise."

25. Article 12, on contracts of employment, should be deleted altogether, as certain Governments had suggested. In his fifth report,[8] the previous Special Rapporteur had in fact drawn the Commission's attention to the scarcity of judicial decisions and of evidence of State practice in that specific area. The need for the exception was therefore not borne out by reality.

26. Article 13, which provided for an exception to State immunity in respect of proceedings relating to compensation for personal injuries and damage to property, was designed to give more protection to private individuals. That was fully understandable. Under article 31 of the 1961 Vienna Convention on Diplomatic Relations, however, diplomatic agents enjoyed immunity from proceedings in tort in the receiving State. Should the State not enjoy the same immunity as its agents? Secondly, article 13 was a complete negation of the principle of the jurisdictional immunities of States, since it made no distinction between sovereign acts and private-law acts, as required by the restrictive doctrine. Thirdly, the attribution to a State of a wrongful act or omission fell within the domain of the international responsibility of States and it would be contrary to the principles of sovereignty and sovereign equality of States if a domestic forum could attribute a wrongful act to a foreign State. Even the previous Special Rapporteur had admitted in his fifth report that customary international law did not provide for the exercise of the jurisdiction of the State in whose territory a wrongful act had been committed when that act was attributable to a foreign State. It was clear therefore that article 13 had no legal basis other than the legislation recently adopted by a very few countries. Moreover, as noted by the secretariat of the Asian-African Legal Consultative Committee in a memorandum prepared in 1982 for the thirty-seventh session of the General Assembly, to make personal injuries and damage to property an exception to State immunity could open the floodgate to litigation against Governments and be a constant irritant to relations between States.

27. For all those reasons, article 13 should be deleted. That did not mean that private individuals would have no redress, but it might be better if the cases covered by the article were settled by the Governments concerned through diplomatic channels, as had been suggested at previous sessions. And if it was traffic accidents that were being contemplated, they were covered by insurance.

28. The Special Rapporteur had proposed the deletion of paragraph 1 (*b*) to (*e*) of article 14 (Ownership, possession and use of property) and the reasons he had given were convincing. In the first place, subparagraphs (*c*) to (*e*) were concerned with the legal practice in common-law countries and could be completely alien to other legal systems. Also, they could be so interpreted as to open the door to foreign jurisdiction even in the absence of any link between the property and the forum State. As the Special Rapporteur had noted, the United States *Foreign Sovereign Immunities Act of 1976* made no provision of that kind.

29. Article 16 (Fiscal matters) was totally unacceptable. Under its terms, States would be able to institute proceedings before their own courts against a foreign State

[7] *Yearbook . . . 1983*, vol. I, p. 300, 1806th meeting, para. 73.

[8] *Yearbook . . . 1983*, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1.

for the recovery of taxes and duties. Its adoption would be contrary to the very concept of sovereignty and the sovereign equality of States.

30. In article 18, the Special Rapporteur had recommended the deletion of the term "non-governmental" and the addition of a new paragraph 1 *bis* (A/CN.4/422 and Add.1, para. 26). He could agree to that deletion and had no criticism to make of the new paragraph, although drafting improvements were required. Also, as noted by the Special Rapporteur, no specific provision was needed with respect to aircraft. The 1944 Chicago Convention on International Civil Aviation, to which the majority of States were parties, made a sufficiently clear distinction between State aircraft and civil aircraft. In any event, a large number of airlines were State-owned and no problems of jurisdictional immunities seemed to have arisen.

31. With regard to article 19, which related to the effect of an arbitration agreement between a State and a foreign natural or juridical person, he noted that the courts of certain countries could exercise a kind of supervisory jurisdiction with respect to commercial arbitration. Conceivably, therefore, consent to arbitration by a State could imply consent to the exercise of supervisory jurisdiction by a forum of another State. One point at issue was whether that exception to immunity should cover arbitration of differences relating to a "commercial contract" or a "civil or commercial matter", which latter expression might widen the scope of the exception. Since exceptions should be kept to a minimum, he considered that the scope of article 19 should be confined to commercial contracts as defined in paragraph 1 (*c*) of the new article 2 (A/CN.4/415, para. 29). He could also accept the Special Rapporteur's proposal to add a new subparagraph (*d*) to article 19 relating to recognition of the arbitral award, on the understanding that it would not be interpreted as implying a waiver of immunity from execution.

32. As for article 20 (Cases of nationalization), there could be no doubt that a measure of nationalization taken by a State in its own territory constituted an act of State and could not be made an exception to State immunity. However, article 20 was by no means clear: was it or was it not intended as an exception? If it was, no definite conclusions could be drawn from its wording; and if it was not, it should not be included in part III of the draft. In any event, he could not agree with the interpretation of the article given by the Special Rapporteur in his second report (A/CN.4/422 and Add.1, para. 41). Moreover, the article stood little chance of acceptance by States; it might as well be deleted or at least be placed in the introductory part of the draft, as suggested by some Governments.

33. Turning to part IV of the draft (State immunity in respect of property from measures of constraint), whose importance he recognized, he noted that the principle which it embodied and which was quite separate from that of the jurisdictional immunity of the State constituted an essential counterweight to the exceptions to State immunity set forth in part III. It was well established that waiver of immunity from jurisdiction did not imply waiver of immunity from execution, from which it followed that the exceptions to immunity from jurisdiction embodied in the draft did not entail non-immunity from measures of constraint. It should be noted, however, that article 21 as it now stood, and especially its subparagraph (*a*), significantly limited that principle of the inadmissibility of measures of constraint against the property of a State. In particular, he could not accept the recommendations made by the Special Rapporteur on the basis of the views of some Governments that the words "non-governmental" and "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" be deleted. Those deletions would have the unfortunate effect of limiting the principle of the immunity of the State from measures of constraint to a far greater extent than was the case, for example, under the United States *Foreign Sovereign Immunities Act of 1976*. If subparagraph (*a*) were amended as suggested by the Special Rapporteur, it might be an irritant to relations between States, especially in the event of the execution of a judgment by default.

34. In his view, article 21, which was the introductory article of part IV, should spell out in no uncertain terms the principle of State immunity in respect of property from measures of constraint and be worded along the lines of article 23 of the 1972 European Convention on State Immunity, while incorporating some of the elements of article 22 of the present draft articles. Paragraph 1 of article 21 would thus read:

> "1. No measures of constraint, including measures of attachment, arrest and execution, against the property of a State may be taken in the territory of another State except where and to the extent that the State has expressly consented thereto, as indicated:
>
> "(*a*) by international agreement;
>
> "(*b*) in a written contract; or
>
> "(*c*) by a declaration before the court in a specific case."

Paragraph 2 would reproduce the text of paragraph 2 of article 22:

> "2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under part IV of the present articles, for which separate consent shall be necessary."

35. The present article 22 should be replaced by the following text:

> "The property of a State against which measures of constraint may be taken under article 21 shall be the property that:
>
> "(*a*) is specifically in use or intended for use by the State for commercial, non-governmental purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed; or
>
> "(*b*) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding."

36. With regard to article 23, he could not agree to the deletion of the term "non-governmental" in square brackets in paragraph 1. In that context, the term had a somewhat different meaning than in article 18. Moreover, paragraph 2 should be deleted, as suggested by some Governments, since its provisions defeated the very purpose of paragraph 1.

37. Referring to part V of the draft (Miscellaneous provisions), and to article 24 (Service of process) in particular, he said that he could accept the revised text proposed by the Special Rapporteur for paragraphs 1 and 2 (A/CN.4/415, para. 248), subject, however, to the deletion of the words "if necessary" in paragraph 3. The translation of documents relating to service of process should be mandatory, for it was essential to the proper conduct of the proceedings and gave the defendant State the necessary protection.

38. Article 25 (Default judgment) appeared to focus exclusively on proper service of process. That point was, of course, important, but it should also be specified that no default judgment could be entered by a court unless the complainant had established the jurisdiction of the court and his claim or right to relief by evidence satisfactory to the court. He therefore suggested that paragraph 1 be revised accordingly and that the words "if necessary" in paragraph 2 be deleted for the reasons which he had indicated in connection with article 24, paragraph 3.

39. Lastly, he believed that it might not be appropriate to include in the draft articles a set of rules on the settlement of disputes concerning interpretation and application. If the draft was to take the form of an international convention, experience showed that it would be wiser to deal with the settlement of disputes in a separate optional protocol. In any case, it would be for a future diplomatic conference to decide that matter.

40. Although the Commission had completed its first reading of the draft articles, there were still some differences of opinion among its members and among Governments. The second reading of the draft would therefore be no easy task, but there was no doubt that the Commission was well prepared to overcome the existing obstacles and to complete the second reading during the term of office of its present members.

41. Mr. REUTER, noting that he would confine his remarks to the first eleven articles and congratulating the Special Rapporteur on his loyalty to his predecessor, his spirit of compromise and his talent for synthesis, said that, in his second report (A/CN.4/422 and Add.1) and in his oral introduction, the Special Rapporteur had concentrated mainly on the controversial provisions of the draft. That approach would enable members of the Commission to take a clear stand on those provisions and then to agree on compromise solutions—even though compromises on matters of principle were always risky.

42. The position was that there were two opposing views: there were those who considered that a principle existed and that it was an established rule of international law having absolute value; and there were those, including himself, who believed that several principles of international law were involved in the present case—State immunity, of course, but also the incapacity of the State to engage in trade in the territory of another State, a principle which had, in fact, radically changed over the years. It so happened that there were no precise and logical rules of international law constituting a body of law that would be applicable at the present time. There were, however, some national directives or guidelines. Precisely what made the present topic so difficult was that national rules had to be converted into international rules. The task the Commission faced therefore required caution. However, the regional agreements concluded by States with similar structures and the wide range of bilateral agreements that had been signed clearly showed that the problem of State immunity was not hampering international trade, which was developing even between States with very different ideologies, structures and principles. Thus, if the Commission was not successful in its task, it would at least have learned that some topics were ripe for codification, while others were not.

43. It therefore had to be determined whether the topic under consideration was ripe for codification in the form of rules acceptable to the two opposing groups of interests and structures. In his preliminary report (A/CN.4/415), the Special Rapporteur had discussed with great clarity the problems of structures, in other words the freedom which internal law gave the State to decentralize, to apportion the powers and responsibility of the agencies which it entrusted with carrying on trade and to commit or not commit itself, as it saw fit. It was usually the socialist countries which availed themselves of that freedom and claimed the benefit thereof. In terms of international law, however, it was open to question whether States could be given absolute freedom to define the legal personality of entities which were one of the components of sovereign authority. In the topic of State responsibility, the Commission had answered that question in the negative by establishing a special régime for acts of regional, communal or other decentralized entities which were vested with sovereign authority; the criterion applied was not that of the definition of the term "State", but, rather, an objective criterion, namely that the State was responsible for certain entities to which sovereign authority had been delegated. The fact was that, in international law, the choice of legal personality made by private interests could not be invoked against States, even those under whose jurisdiction such private interests might operate.

44. Turning to the draft articles, he drew attention to the fundamental importance of the expression "commercial contract", as referred to in article 2, and also in article 3 and article 11. It would be necessary to apply objective criteria in order to formulate a fair and acceptable text on commercial contracts. It would then have to be decided whether the purpose of a commercial contract was a valid objective criterion. He would not mind if the Commission took account of that criterion, provided that it did so with complete objectivity. In that connection, it was not enough to state that purpose was a criterion which could by itself serve to determine the nature of a contract, because in the socialist system, for example, all purposes corresponded to a general interest: the interest of the State. While he therefore agreed with the approach of maintaining absolute immunity, he did not think that it was desirable to do so by such an indirect method. It must be borne in mind that an ordinary commercial contract that did not give rise to State immunity could later become a contract which brought that immunity into play: that would happen in the case—mentioned at a previous session—of a contract for the supply of foodstuffs during the performance of which a famine occurred, thus requiring the State that had concluded the contract to invoke all sorts of privileges, such as amending the contract or imposing new obligations on the other contracting party in order to achieve a basic objective. A suitable formula would have to be found, perhaps by supplementing the texts proposed by the Special Rapporteur. It was not enough to refer to State practice: mention would

have to be made of the existence of treaties and agreements. He therefore proposed the addition of a provision specifying that, if a commercial contract lost its commercial character as a result of exceptional circumstances, the Government authorities had the right to amend it and, consequently, to consider that State immunity applied. He believed that a compromise solution should be easy to reach on that point.

45. With regard to the problem raised by the reference to "organs of government", which, under the draft articles, were covered by the term "State", he noted that article 3, paragraph 1, had to be read in conjunction with article 7, paragraph 3, which supplemented it. In his view, however, the question of the representation of the State had not been dealt with in sufficient detail in those provisions. Some members and former members of the Commission had been addressing that question: he was thinking in particular of the publications by Mr. Tomuschat. He had also received an advance copy of an article by Jean Salmon and Sompong Sucharitkul which was to be published in the *Annuaire français de droit international, 1987* under the title "*Les missions diplomatiques entre deux chaises: immunité diplomatique ou immunité d'Etat?*". For example, could a diplomat representing a State in a court case enjoy both types of immunities, namely those to which he was entitled as a diplomat, as well as those of the State against which the case had been brought? What should the court do in such a case? In other words, did the mandate given to the representative by the entity being represented entail all of the latter's immunities? To take another example, what would happen in the event of an action brought against a decentralized State agency? Were there not cases in which such agencies represented the State? The problem should not be treated lightly. While, in some respects, it could be resolved fairly easily without raising major political issues, in other respects—particularly in the case of segregated property—it might lead to serious differences of opinion.

46. The question that arose in connection with article 6, whose wording needed to be reconsidered, was whether the phrase in square brackets, which was unacceptable to some members, should be retained or replaced by another. He personally found it hard to believe that the proposed wording could resolve the major issues at stake. He also had doubts about the appropriateness of the words "subject to the provisions of the present articles". Would it not be possible, after amending the beginning of the article, to use neutral wording along the following lines: "A State . . . from the jurisdiction of the courts of another State under the provisions of the present articles"? Any claim to the enunciation of a principle would thus be removed from the text. He would be interested to hear the views of other members of the Commission on that suggestion. As to the compromise solution proposed by the Special Rapporteur in his second report in the form of a new article 6 *bis* (A/CN.4/422 and Add.1, para. 17), he was a little worried that such an ingenious mechanism might pave the way for further limitations on, or exceptions to, diplomatic immunity. As there was a strong likelihood that the draft articles would become a draft convention, the future instrument might form the subject of reservations; and, despite the strict provisions of the 1969 Vienna Convention on the Law of Treaties, reservations were widely accepted in practice. Draft article 6 *bis* would thus be a gift to States which were opposed to immunity.

47. Out of a sense of fairness, the Special Rapporteur wanted article 28 to serve as a kind of compensation for those in favour of the bracketed phrase in article 6 in case that phrase were deleted. In that connection, Mr. Shi had just made some comments which defined the scope of article 28, and the German Democratic Republic had pointed out in its comments and observations (A/CN.4/410 and Add.1-5) that the principle of reciprocity was a fundamental one, but that no one knew how far that principle might lead. He shared that view. A draft article on reciprocity was necessary and it had to be broad and generous; but the matter needed further study. He could not, however, support Spain's proposal that the bracketed phrase be deleted from article 6 and that the following provision be added to the preamble to the future convention: "*Affirming* that the rules of general international law continue to govern questions not expressly regulated in this Convention" (*ibid.*). That proposal went to the very heart of the problem: who had a right to say that there were lacunae in the convention? It would be best to avoid wording that cast doubt on principles.

48. He supported articles 8 and 9 and, in particular, the recommendations made by the Special Rapporteur in his preliminary report (A/CN.4/415, paras. 89-92 and 98-99). However, although he agreed with the principle stated in article 9, paragraph 3, he thought that the text needed redrafting, since the words "shall not be considered as consent" were too general. The words "shall not necessarily mean consent" would be enough, for there were circumstances where absence might well be equivalent to an appearance.

49. With regard to the title of part III of the draft, he said he was not sure that there really was a difference between the terms "limitations" and "exceptions". It might be better to find another term that would not give rise to problems. He had never been convinced by the previous Special Rapporteur's explanations concerning article 11 and, more particularly, regarding a "commercial contract concluded between States or on a Government-to-Government basis". A problem of representation arose in that connection as well: did not the Government represent the State?

50. Lastly, referring to the proposed new article 11 *bis* (*ibid.*, para. 122), he again noted that the problem of representation, which involved the relationship of the State with entities separate from it in internal law, was a delicate one. He had no major objection to draft article 11 *bis*, but he would like the matter to be considered in greater depth by the Commission.

51. Mr. TOMUSCHAT said that, thanks to the Special Rapporteur's exemplary report and to the work of his predecessor, the draft articles deserved to be adopted on second reading during the Commission's present quinquennium. He therefore hoped that the Commission would succeed in overcoming the remaining difficulties. Instead of going into issues of principle to which the draft articles gave rise, he intended to concentrate on drafting points, taking into account the comments made by Governments.

52. Article 2 (Use of terms), in both its old and proposed new forms, raised a considerable number of problems. It was to be welcomed that, in defining the term "State" in the proposed new text (A/CN.4/415, para. 29), the Special Rapporteur had decided not only to refer to the central State

and its various organs, but also to take account of other entities: that was a natural consequence of the functional interpretation of the privilege of immunity embodied in articles 6 *et seq.* It had to be pointed out, however, that, if the decisive criterion in determining immunity was that of commercial activity, then it did not matter whether it was the head of State or a civil servant employed by a local government who had acted; but, if immunity was to be regarded as a personal privilege attaching to the nature of the corporate body, then the provisions on the use of terms might have to be re-examined.

53. He had serious doubts about the key concept of "sovereign authority", as opposed to the expression "government" or "governmental" authority used in part 1 of the draft articles on State responsibility.[9] In that connection, he noted that the commentary to article 3 (Interpretative provisions) of the present draft explained that subdivisions of the State at the administrative level of local or municipal authorities did not normally perform acts in the exercise of the sovereign authority of the State.[10] He also noted that a commentator on the United Kingdom *State Immunity Act 1978*, in which the expression "sovereign authority" was also used, had equated "sovereign authority" with "supreme authority" and concluded on that basis that a separate entity would be entitled to immunity only in rare instances. He considered it wrong to try to narrow down the scope of the draft articles, particularly since the French text referred to *prérogatives de la puissance publique*, an expression also to be found in the draft articles on State responsibility. There, the Commission had taken the view that the correct translation of that expression into English was "government" or "governmental" authority. If it now chose a different expression, erroneous conclusions would be drawn. The previous Special Rapporteur might have wished to follow the terms of the 1972 European Convention on State Immunity, which equated "sovereign authority" with *puissance publique* and *acta jure imperii*. The Commission must, however, remain faithful to the logic of its own drafts. He would therefore prefer the word "sovereign" to be replaced by "governmental", at least in paragraph 1 (*b*) (iii) of the new article 2. The Commission could also rewrite the commentary, indicating that it did not matter at what level sovereign or governmental authority was exercised. It should be made crystal clear, for instance, that a decision of a lower court was as much an act of State authority—not to be challenged in proceedings abroad—as a judgment of higher courts of the foreign country concerned.

54. He was also unhappy with the wording of paragraph 1 (*b*) (ii) of the new article 2. To say that political subdivisions of the State were those which were entitled to perform acts in the exercise of the sovereign or governmental authority of the State might be correct in the case of States with provinces or regions, but that wording did not do justice to the situation of federal States where both the central State and the component units were States, the component units sometimes taking pride in asserting that, historically, they had come first and that the power of the central State derived from their prior existence as political entities. In any event, the component states never acted in the exercise of the sovereign authority of the State, which could be vested only in the central State. He would therefore prefer the following wording: "political subdivisions of the State vested with sovereign or governmental power". With regard to the components of a federal State, it was indeed appropriate to speak of "sovereign" authority, and his earlier criticisms of the use of that term did not apply in that context.

55. He also had a slight doubt about the expression "agencies or instrumentalities", which had been borrowed from the United States *Foreign Sovereign Immunities Act of 1976*. Unfortunately, that Act extended the privilege of immunity to private corporations owned primarily or exclusively by the State. He did not think that business corporations, whoever their owner, deserved any kind of privileged treatment. That, however, could also be clarified in the commentary.

56. He would have liked the words "commercial contract" to be replaced by "commercial activity", for the fact that a State had concluded a business contract with a private individual or corporation implied that it had not made use of governmental powers; but it might be too late for such a change, because article 11, which set forth the only rule to which paragraph 1 (*c*) of the new article 2 applied, referred to "commercial contracts". However, even if the change were not made, the word "commercial" should be deleted in paragraph 1 (*c*) (i), since it was only logical that the term being defined and the definition should not be identical.

57. Paragraph 1 (*c*) (iii) was also illogical: in view of the text of paragraph 1 (*c*) (i), "any other" contract or transaction could hardly be of a commercial nature. There, too, the adjective "commercial" should be deleted.

58. Paragraph 3 of the new article 2 was an improvement on the text adopted on first reading (para. 2 of former article 3). He nevertheless took it that, according to the present wording, a contract between the parties had to state explicitly that a public governmental purpose was to be served. That might well be a viable compromise. It seemed to him, however, that the best results could be achieved by relying on the nature of the transaction. To have recourse to the purpose of the transaction would always, of necessity, lead to doubt, inasmuch as a governmental authority always had to bear the public interest in mind. A State was not a private person acting with a view to making a profit; he agreed with Mr. Reuter on that point.

59. With regard to paragraph 2, he continued to be of the view that it was not necessary to specify that the draft articles were without prejudice to other international instruments or to the internal law of States. It would, however, be useful to state that the use of terms employed in other international instruments or in internal laws did not necessarily mean that the Commission accepted them with the meaning attached to them in their original context. For example, in the particular case of the words "agencies or instrumentalities", it would be well to indicate that the Commission did not follow the precise interpretation given them in the United States *Foreign Sovereign Immunities Act of 1976*, which qualified private corporations as "instrumentalities". All the terms used by the Commission would receive their own connotation by the mere fact of being included in the draft articles, and to underline that autonomy would be more useful than to make a disclaimer to the

[9] *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

[10] *Yearbook . . . 1986*, vol. II (Part Two), p. 14, para. (3) of the commentary.

effect that the present articles were not intended to encroach on the internal law of States or on international instruments in force.

The meeting rose at 1.05 p.m.

2116th MEETING

Friday, 9 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/422 and Add.1,[3] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[4] ON SECOND READING (*continued*)

1. Mr. TOMUSCHAT, continuing the statement he had begun at the previous meeting, said that he questioned the wisdom of confining the reservation in article 4, paragraph 2, to heads of State, since it was highly probable that they were not the only persons to enjoy the privileges and immunities to which the article referred. It might therefore be appropriate to add the phrase "or other government officials" after "heads of State", in order to take account of the applicable rules of international law and thus leave open the possibility that there were other persons to whom certain privileges and immunities extended.

2. The bracketed words in article 6, "and the relevant rules of general international law", were highly problematic, but they might prove necessary if the limitations and exceptions were framed too restrictively. Rules of customary law could be set aside only if a fair balance was established. The objective in any case should be to submit a text based on consensus to the General Assembly.

3. In his view, the proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17) was unworkable, since it could not be considered as a reservation. The effect of a reservation was to restrict the obligations a State would otherwise undertake under a multilateral treaty. Under article 6 *bis*, however, a State would acquire rights *vis-à-vis* other States by virtue of a unilateral declaration. Even if such a subterfuge were obviated by an objection, it would not constitute a sound precedent in international law.

4. The problem raised by article 7 lay in the words "so long as the proceeding", in paragraph 2, which were ambiguous. If the intention was to rely on a specific point in time, the text should specify the moment at which the proceeding was initiated.

5. The proposed changes in article 11 (A/CN.4/415, para. 121) were acceptable. The original wording in paragraph 1, "the State is considered to have consented to the exercise of that jurisdiction", was clumsy and departed significantly from the standard phrase used in other articles, namely "A State cannot invoke". It could be interpreted as meaning that States could do away with the limitation or exception by declaring that they had no intention of forgoing their privilege of immunity when entering into a commercial contract. The interests of legal certainty would thus be served by bringing article 11 into line with the other relevant provisions.

6. With regard to the use of the word "State", he agreed with the comments made by the Government of Australia. The draft would be more readily comprehensible if reference were made consistently to the "forum State" on the one hand and the "foreign State" on the other. The usefulness of such a change was evidenced, in particular, by article 3, paragraph 2. In the text adopted, reference was made to "that State", but it remained uncertain which of the two States was meant, a point clarified only by the commentary.

7. Mr. CALERO RODRIGUES said that he had made his views on the draft articles known on many occasions. The only points on which he felt he should express himself now concerned possible amendments on second reading. The Special Rapporteur's two reports should be seen as a commendable attempt to reconcile opposing points of view.

8. The Special Rapporteur's proposal to combine articles 2 and 3 was acceptable, and he himself would be happy to dispense with the title of article 3, "Interpretative provisions". The only important change to result from merging the two articles related to contracts. The adopted text of article 3, paragraph 2, established that the purpose of the contract should be taken into account in order to determine whether it was, or was not, commercial in character when that purpose was relevant in the practice of the State concerned. The Special Rapporteur had pointed out that elimination of the purpose criterion could lead to difficulties, and the solution he proposed in paragraph 3 of the new article 2 (A/CN.4/415, para. 29) might be acceptable. States would be given the right to determine, in advance and by agreement, whether a contract was to be regarded as commercial. While that proposal reduced somewhat the scope of the reference to purpose, it served the interests of clarity.

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

[2] *Ibid.*

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

[4] For the texts, see 2114th meeting, para. 31.

9. He supported the change proposed by Australia for article 4, namely to add the words "under international law" after the word "State" in the introductory clause of paragraph 1.

10. Article 6 had given rise to many difficulties and was of crucial importance. He had already indicated his preference for deleting the words in square brackets, since they would effectively undermine the scope of the draft articles. He had no objections to incorporating in the future convention a preambular paragraph along the lines suggested by Spain. But he had doubts concerning the Special Rapporteur's suggestion in his second report (A/CN.4/422 and Add.1, para. 17) that it would be appropriate to include a new article 6 *bis*. In his view, the usefulness of the new article was not certain: the wording was not at all clear and the resulting régime was likely to prove unduly complex.

11. The drafting changes suggested by Australia for article 7 met with his support. However, the new wording proposed by the Special Rapporteur for article 8 (*c*) (A/CN.4/415, para. 93) did not represent any great improvement on the existing text. It might be preferable simply to use the phrase "by written declaration submitted to the court".

12. The comments made by the United Kingdom and Mexico on article 9 were well-founded and could be duly reflected in a revised text. On the other hand, the proposal by the Special Rapporteur to incorporate a new paragraph 4 in article 10, as suggested by Thailand, was of doubtful validity, since the new text (*ibid.*, para. 107) was less than clear. Immunity would, according to the new text, be accorded if the counter-claim sought excessive or different relief, a criterion which might prove impracticable. The proposal by Australia to merge paragraphs 1 and 2, however, had much to recommend it.

13. As to article 11, the Special Rapporteur was right in saying that the reference in paragraph 1 to "the applicable rules of private international law" should be retained and that the words "is considered to have consented" introduced an unnecessary complication.

14. The proposed new article 11 *bis*, on segregated State property (*ibid.*, para. 122), had already been extensively discussed and was basically acceptable. It should none the less be reformulated. The important element to be borne in mind in the context of article 11 *bis* was the need to ensure that the contractor did not gain the impression that the enterprise with which he was dealing was automatically underwritten by the State.

15. Mr. MAHIOU said that, while he found the comments and observations of Governments on the draft articles highly interesting, the presentation of the topic was not ideally clear, and it was not always easy to discern the views of the Special Rapporteur in his reports. It was plain that there were two divergent approaches to jurisdictional immunity, namely absolute immunity and restricted immunity, but it should be possible to find common ground with regard to the underlying purpose of the draft. In fact, he doubted whether there were only two conceptions or positions regarding immunities. The two extreme conceptions of so-called "absolute" or "restricted" immunity had indeed been evident in the debates, but they appeared to be the views of the minority, both in the Commission and in the Sixth Committee of the General Assembly. In the presentation of the problem, therefore, emphasis should not be placed on the two extreme positions: it would be better to bring out the flexible and pragmatic approach which appeared to be predominant and which offered a basis for the elaboration of a generally acceptable draft convention. Any extreme interpretation would make the task of codification difficult or impossible. The restrictive interpretation, it would be recalled, was embodied in the 1972 European Convention on State Immunity, but only a minority of European States had so far acceded to that Convention, whereas the Commission's aim in drafting the present articles was to arrive at a text acceptable to the international community at large. Thus, although the European Convention merited close consideration, it should not be followed slavishly in every respect.

16. With regard to judicial precedents, mention had already been made of cases in which State immunity was restricted, but it should be borne in mind that, in most of those cases, the States concerned had contested the rulings of the courts. It was therefore inappropriate merely to refer to those court rulings in discussing State practice. In general, it was difficult to concur with the Special Rapporteur in detecting in State practice an implicit acquiescence to the restrictive rule of immunity. African and Asian State practice, in particular, would not bear out that assumption.

17. The Special Rapporteur had cited the case-law of a number of countries to show the developing trends in the treatment of immunity by domestic courts. It was necessary, however, to examine the points of controversy in the case-law of European countries. In his second report (A/CN.4/422 and Add.1, para. 40), the Special Rapporteur mentioned a decision by the *Tribunal de grande instance* of Paris in 1970, according to which a foreign State, by becoming party to an arbitration clause, had agreed to waive its immunity from arbitral jurisdiction, up to and including the procedure for granting an *exequatur*. The same position had been taken by the Court of Appeal of Paris in 1981. Yet those decisions were disputed in French doctrine. One jurist, Pierre Bourel, a specialist on international arbitration, had argued in an article in the *Revue de l'arbitrage* (1982) that both decisions confused the arbitration agreement with an acceptance of the procedure for an *exequatur*. The same writer had warned against reading too much into an arbitration clause, since the existence of such a clause was not sufficient to show that the disputed act was a commercial act performed *jure gestionis*. Even among States which favoured the restrictive approach, the same clause was sometimes interpreted differently. Regarding contracts of employment—dealt with in article 12 of the draft—article 5 of the 1972 European Convention expressly barred immunity from jurisdiction for such contracts, whereas article 32 made an exception to that rule for diplomatic personnel. In a case brought by a staff member of a foreign embassy before the United Kingdom Employment Appeal Tribunal, *Bengupta* v. *Republic of India* (1982), the court had held that the respondent had immunity; yet in a similar case—in which the same country was a party—before the Swiss Federal Tribunal, *S.* c. *Etat indien* (1984), the court had given a contrary interpretation of the European Convention. Because of such conflicting precedents, caution was needed in interpreting the trends in different countries and regions.

18. In many respects, the Special Rapporteur had been able to make improvements on the adopted texts of art-

icles 1 to 11. Article 7, on modalities for giving effect to State immunity, had been substantially improved in the proposed new version (A/CN.4/415, para. 79). Similarly, the new text of subparagraph (*c*) of article 8 (*ibid.*, para. 93) was a useful clarification. However, the word "matter" in the introductory clause should be replaced by "dispute". He also favoured the proposed new text of article 9 (*ibid.*, para. 100), and had no objection in principle to the new paragraph 4 of article 10 (*ibid.*, para. 107), although he would like to know the reasons for including it. Quite plainly, the controversy surrounding the respective merits of "limitations" and "exceptions" in the title of part III of the draft should now be brought to an end. Again, article 11, paragraph 1, was better in the simplified version (*ibid.*, para. 121).

19. Nevertheless, several points in the draft articles required clarification. The first was the relationship between the draft and existing diplomatic conventions, and the implications of the restrictive approach. According to article 4, existing privileges and immunities were not affected. But the Commission had not properly considered the point. According to the restrictive view, all acts of a State *jure gestionis*, such as commercial contracts, did not enjoy immunity; but the same acts, if carried out by diplomatic personnel, had diplomatic immunity under article 31 of the 1961 Vienna Convention on Diplomatic Relations. The Commission must ask itself whether it intended to arrive at the paradoxical result that a State could be subject to proceedings for certain acts which would be beyond the reach of the domestic courts when carried out by its diplomatic officials. He would urge the Special Rapporteur to consider that question and seek to remove the ambiguities.

20. Secondly, there were some difficulties of terminology, especially where the French and English texts of the draft articles diverged. In articles 3 and 7, the expressions "sovereign authority" and *puissance publique* were treated as equivalents, whereas in article 7 of part 1 of the draft articles on State responsibility,[5] the English expression used for *puissance publique* was "governmental authority". The discrepancy was also a substantive one, because *puissance publique* could mean a State entity not exercising sovereign authority. The point should be clarified and the texts harmonized.

21. His third criticism related to the criteria used to define a commercial contract. In articles 2 and 3, reference was made both to the purpose and to the nature of the contract, in an effort to reconcile different approaches to the question. There were situations in which the nature of the contract was not sufficient to show its character. That was true in the field of defence, or of action to alleviate public distress such as drought or famine, and such situations must be taken into account in the definitions in article 2. It must also be borne in mind that States could not always foresee what exceptional situations might arise. The formulation should be considered again in that light.

22. The phrase in square brackets in article 6, "and the relevant rules of general international law", was ambiguous: it might admit the application of future rules and could be interpreted in different ways to accommodate both the restrictive and the traditional approach to State immunity. The new article 6 *bis* proposed by the Special Rapporteur (A/CN.4/422 and Add.1, para. 17) did not resolve the problem. According to the new article, a State could make a declaration of exceptions in addition to the cases falling under articles 11 to 19; however, a long list of exceptions would defeat the object of the draft. Obviously, some redrafting was necessary to avoid that consequence.

23. It was difficult to understand the precise scope of the proposed new article 11 *bis* (A/CN.4/415, para. 122), especially since the explanations given were so brief. The idea of "segregated State property" was a new one which required explanation. He did not understand the meaning of a contract "on behalf of a State", and wondered whether State entities were to be treated as the equivalent of States in that context. If, under contract, a State enterprise made use of property, such as aircraft, belonging to the State, the enterprise alone would be liable under the contract, and it was not clear what role the State itself would play. He agreed, in that connection, with the German Democratic Republic's comments on article 3, paragraph 1, and also largely supported its suggestion for a new paragraph 2 (A/CN.4/410 and Add.1-5).

24. Mr. RAZAFINDRALAMBO said he agreed with Mr. Mahiou that the tendency to restrict immunity was far from universal. Since the jurisdictional immunity of States and their property was a fully recognized concept, based on the sovereign equality of States, the Commission must codify the topic to take account of exceptions in State practice and of those necessitated by the conduct of international relations. The Special Rapporteur favoured a system of functional immunity and showed much dexterity in reconciling the two different approaches. A proper balance was needed to reflect the interdependence between market economy countries and socialist countries and between States which exported capital and technology and States which exported raw materials.

25. The idea of combining articles 2 and 3 in a single article, entitled "Use of terms", made for greater simplicity, and he could support the amended paragraph 3 of the new combined article 2 (A/CN.4/415, para. 29), which eliminated the difficulties of interpretation in the previous text (para. 2 of former article 3). He wondered, however, whether the new paragraph 3 might not restrict the criterion of the purpose of the contract. Quite possibly, the contracting State might not divulge to the other party that the contract was to be concluded for a public purpose, something that might well happen in the case of developing countries seeking to obtain capital goods. In his view, the previous text was better from the standpoint of third world countries, which would have been able to rely on their own practice in determining the nature of their contracts.

26. As to article 6, he could not accept the idea of allowing an arbitrary restriction of immunity through the "relevant rules of general international law". If the phrase in square brackets were retained, the reservation could defeat the Commission's purpose in codifying the topic. In his second report (A/CN.4/422 and Add.1, para. 17), the Special Rapporteur proposed a new article 6 *bis*, under which, by a mere declaration, any State party could proffer a long list of exceptions to immunity. The time-limit of 30 days for objections would be unworkable. As Mr. Reuter (2115th meeting) had argued, that proposal would defeat the object

[5] See 2115th meeting, footnote 9.

of the draft, and he reserved his own position until the matter could be studied further, especially in connection with article 28.

27. In essence he did not object to article 7, but it might in practice duplicate the provisions of article 3, paragraph 1, or paragraph 1 (*b*) of the new article 2. In fact, the definition in article 7 reflected the "interpretative provisions" of article 3 and it should be reviewed by the Drafting Committee.

28. The new text proposed for subparagraph (*c*) of article 8 (A/CN.4/415, para. 93), on express consent to the exercise of jurisdiction, emphasized the nature of the express consent and specified that the declaration must be written—a highly relevant change. However, there seemed little sense in saying that the declaration must be submitted to the court "after a dispute between the parties has arisen": if a case reached the court, it necessarily concerned a current, not a future, dispute. Generally speaking, he agreed with the Special Rapporteur that the option of invoking a fundamental change of circumstances would have a destabilizing effect on contractual relationships and that an agreement on the applicable law should not be treated as consent to the exercise of jurisdiction by a given State. Those points should be dealt with in the commentary.

29. The new text proposed by the Special Rapporteur for article 9, paragraph 1 (*ibid.*, para. 100), was acceptable, but he could not agree to the new paragraph 3, since appearance as a witness did not constitute participation in the proceeding.

30. Article 10 offered considerable room for improvement and the proposal made by Australia could be studied by the Drafting Committee. Paragraph 3 might well take the place of paragraph 1, for it represented a typical case of a State seeking to invoke immunity. The idea of an additional paragraph along the lines suggested by Thailand was to be welcomed. If the objects of the claims were different, the counter-claim would in any case encounter a jurisdictional objection *ratione materiae*. Nevertheless, the new paragraph 4 proposed by the Special Rapporteur (*ibid.*, para. 107) should be more clearly worded to show that the State invoking immunity could only be the foreign, and not the forum, State.

31. The amended text proposed by the Special Rapporteur for article 11, paragraph 1 (*ibid.*, para. 121), on the basis of the comments made by Governments, met with his support. In particular, the use of the formula "by virtue of the applicable rules of private international law" was satisfactory in substance, but he would draw attention to the useful drafting suggestion made by Australia (A/CN.4/410 and Add.1-5).

32. By and large, he approved of the new article 11 *bis* proposed by the Special Rapporteur (A/CN.4/415, para. 122), particularly the inclusion of the proviso: "unless a State enterprise, being a party to the contract on behalf of the State, with a right of possessing and disposing of a segregated State property, is subject to the same rules of liability relating to a commercial contract as a natural or juridical person". However, the adjective "private" should be inserted so as to make it clear that the State enterprise should be placed on the same footing as a private individual or corporation. The wording as it stood, namely "natural or juridical person", was ambiguous, since State enterprises were themselves juridical persons.

33. In paragraph 1 of article 12, on contracts of employment, he could accept the suggestion to eliminate the non-immunity rule with regard to social security. In countries with a social security system, registration of a worker constituted a supplementary form of protection that was mandatory for the employer. Hence it would not be appropriate to allow a State which was an employer to invoke its immunity on the grounds that it had voluntarily omitted to register an employee under the social security system.

34. The comments made by the United Kingdom Government on the lack of clarity in paragraph 2 (*b*) of article 12 were interesting. He did not object to the provision in substance, but doubted whether it was really necessary, especially in view of article 26, on immunity from measures of coercion. On the other hand, paragraph 2 (*a*), which made an exception where "the employee has been recruited to perform services associated with the exercise of governmental authority", was a necessary provision. The services in question were connected with the exercise of governmental authority. In countries such as Madagascar, the contracts of employment of public officials fell outside the jurisdiction of the ordinary labour courts; disputes relating to those contracts fell within the competence of the administrative courts.

35. Mr. AL-QAYSI said that the Special Rapporteur's excellent reports would be of great assistance in the second reading of the draft articles. They demonstrated the Special Rapporteur's great ability to present a wealth of controversial material in a framework of compromise.

36. The basic differences of principle at the very foundation of the present topic were well known. They had often come to the fore in the Commission's past discussions and reflected deep-rooted political, social and economic differences. The Commission had not yet succeeded in bridging that gap, and it was unlikely to achieve that goal by going over the same ground now. Consequently, it should focus on a middle-ground approach and aim at solutions which struck a reasonable balance between the need to preserve established principles, on the one hand, and the policy considerations of certainty in the rules of law and uniformity of solutions, on the other, while meeting the justified expectations of the parties concerned and ultimately the requirements of fairness.

37. The two schools of thought on the issue of immunity—those of absolute immunity and of restricted immunity—had advanced abundant arguments in support of their respective positions. At the same time, each school had also adduced strong arguments against the other. At the end of the day, however, a choice had to be made. For the Commission, the choice lay in seeking a consensus which could serve the collective interests of the international community, consisting as it did of sovereign States whose relations were becoming more and more interdependent. He did not propose to dwell on the theoretical aspects of the topic, since that would not be in consonance with the nature of a second reading of draft articles. Moreover, the opinion of an individual member of the Commission on the prospects of success of the draft was not very important. The essential thing was to try to forge concrete draft articles by consensus. It would then be for States to decide the fate of the draft.

38. He agreed with the Special Rapporteur's proposals to confine article 1 to the determination of scope alone and to merge articles 2 and 3 in a single new article 2, on the use of terms. It was precisely the purpose of an article on the use of terms to clarify the meaning of the most fundamental terms recurring in a legal instrument. The article would thus have an interpretative effect, so that another one like former article 3, on interpretative provisions, would be unnecessary. Indeed, such an article could prove confusing at times. The text of the new combined article (A/CN.4/415, para. 29), however, posed some drafting problems. The new paragraph 3 set out the criteria for determining whether a contract had a commercial character. In that connection, he drew attention to the very pertinent observations made by the Government of Qatar on paragraph 2 of article 3 (A/CN.4/410 and Add.1-5). The new paragraph was a better formulation and, while he agreed with Mr. Calero Rodrigues that it reduced the scope of the provision, it none the less had the merit of clarity.

39. The question also arose as to the meaning of the word "parties" in the new paragraph 3. It was clear from the language of the provision that the criteria for determining the commercial character of a contract applied only to contracts "for the sale or purchase of goods or the supply of services", i.e. those referred to in paragraph 1 (*c*) (i). Did the same criteria cover subparagraphs (*c*) (ii) and (*c*) (iii) as well? It was plain from the words he had quoted that the answer was in the negative. Again, if a contract of loan between two States was concluded for a public purpose, the contract would not seem to have the characteristics of a commercial contract. He would be grateful to the Special Rapporteur for a clarification on that point.

40. The recommendation of the Special Rapporteur was that the privileges and immunities under article 4, paragraph 2, should be confined to heads of State. In fact they should be extended also to heads of Government and to ministers for foreign affairs, who represented their States in international relations. In that connection, the Government of Spain, in its very pertinent comments (*ibid.*), had referred to article 21, paragraph 2, of the 1969 Convention on Special Missions, which read: "The Head of the Government, the Minister for Foreign Affairs and other persons of high rank . . . shall enjoy . . . the facilities, privileges and immunities accorded by international law." Such privileges and immunities had to be extended pursuant to the rules of international law, and not merely as a matter of courtesy as the Special Rapporteur suggested.

41. It had been suggested that the square brackets around the words "and the relevant rules of general international law", in article 6, should be removed in the interests of making allowance for the development of rules of international law relating to jurisdictional immunity. For his part, he did not believe that the argument was a decisive one. The Commission was primarily engaged in the task of codifying the law as it stood. In the event of further significant developments in the matter, the draft articles could be reviewed.

42. The Special Rapporteur proposed a new article 6 *bis* (A/CN.4/422 and Add.1, para. 17) apparently for the purpose of making a concession to those who upheld the restrictive theory of State immunity. The provisions of the new article would make it possible to add further exceptions to those set forth in articles 11 to 19. However, the provisions of articles 11 to 19 were already too wide and, if anything, should be limited still more. Viewed in that light, article 6 *bis* did not represent the compromise the Special Rapporteur conceived it to be. As indicated by Mr. Reuter (2115th meeting), its provisions might well prove unruly, a point which had also been made by Mr. Mahiou. Moreover, Mr. Tomuschat and Mr. Calero Rodrigues had rightly pointed out that the article was unworkable and, if retained, would prove a source of complications. He was prepared to accept article 6 with the elimination of the square brackets, on the understanding that it would be read in conjunction with article 28.

43. The Special Rapporteur, in response to a proposal by Australia, had recommended that article 7, paragraph 1, should start with the words "A forum State", instead of "A State" (A/CN.4/415, para. 79). That change would clarify the text, but unfortunately the words "forum State" thus appeared twice in the same short paragraph. He himself would suggest that, in the second case, the words "in a forum State" could be replaced by "in a court". In the proposed new text, the opening words of paragraph 2, "A proceeding in a forum State", were correct: they were a clear reference to a court. The new wording of paragraph 3 referred to the provisions of paragraph 1 of former article 3, rather than to those of the new article 2 that was the outcome of merging former articles 2 and 3. Paragraph 3 thus referred to "subparagraphs (*a*) to (*d*) of article 3, paragraph 1", an overloaded cross-reference that could be made simpler and more accurate by saying: ". . . when the proceeding is instituted against any State as defined in article 2, paragraph 1 (*b*). . . ".

44. The new text proposed by the Special Rapporteur for article 9, paragraph 1 (*ibid.*, para. 100), which Mr. Calero Rodrigues had aptly described as covering the case of "intervention by mistake", was largely acceptable. The form of language used, however, implied that the reservation contained in that provision would apply not only to the case mentioned in paragraph 1 (*b*), namely where the State concerned had intervened in the proceeding, but also to the situation covered by paragraph 1 (*a*), namely where the State had "itself instituted that proceeding". It was unthinkable for a State which had instituted proceedings to be allowed to say that it had appeared before the court solely in order to obtain a knowledge of the facts with a view to determining whether it could claim immunity or not. The effect of the reservation should therefore be limited to the situation covered by paragraph 1 (*b*), as was clearly indicated in the United Kingdom's comments on the article (A/CN.4/410 and Add.1-5). The proposed new paragraph 3 was intended to accommodate a proposal by the Government of Mexico, but the last part of the paragraph could be reworded along the following lines: ". . . does not affect the immunity of that State from the jurisdiction of that court".

45. He could agree to the Special Rapporteur's recommendations regarding article 11, but the amended text proposed for paragraph 1 appeared to equate choice of jurisdiction with choice of law. Actually, in private international law, the rules on those matters were not identical in all cases, a point that would have to be clarified in the commentary.

46. As rightly pointed out by Mr. Mahiou, the expression "segregated State property" in the proposed new article 11 *bis* (A/CN.4/415, para. 122) required clarification. The article had been introduced apparently in order to deal with an institution which existed under the Soviet legal system and in the legal systems of a number of other socialist countries. As the Special Rapporteur had indicated in his preliminary report (*ibid.*, para. 14), the Constitution of the USSR specified that State property was the "common property of the Soviet people" and declared it to be "the principal form of socialist property". The concept of segregated property had emerged in connection with State enterprises and their submission to the jurisdiction of a court of a forum State in respect of that property. In fact, a similar situation could arise with regard to certain non-socialist developing countries, and the provisions of article 11 *bis* would apply to the State enterprises of those countries. Clearly, the expression "on behalf of a State", at the beginning of the article, required further scrutiny and the Drafting Committee could improve the overall wording.

47. Mr. BARSEGOV thanked the Special Rapporteur for a painstaking report on a difficult topic and for his clear presentation, which would facilitate the Commission's work.

48. The question of the jurisdictional immunities of States went to the core of international law, since it involved the principles of sovereignty and sovereign equality of States. With the increasing interdependence of States and the expansion of their economic, scientific and cultural relations, the legal regulation of international trade and international economic relations was assuming growing importance. The interest of Soviet jurists in the issue had grown considerably with the restructuring of the economic mechanism and particularly of foreign economic activity. Since the rule of State immunity was directly based on a *jus cogens* rule of international law, the relevant provision in the draft articles could obviously not be based on limited or functional immunity. A solution to the problem could be found only on the basis of the reaffirmation of the jurisdictional immunity of States and their property, with clearly defined exceptions laid down in the interest of strengthening international economic relations. It was precisely in that area that a compromise must be found. The task could be tackled only if account were taken of the legislation and practice of States from the various economic and social systems, including those of the capitalist, socialist and developing worlds.

49. In that connection, he would draw attention to the reforms under way in the USSR, which underlined the need for a definite solution to the problem and also opened up new perspectives in the search for a compromise on the basis of clearly defined exceptions. Legislative instruments had been enacted with a view to bringing about an in-depth renewal of relations with respect to socialist property, the establishment of a fully-fledged socialist market, and the formation of a system of economic relations that might be termed the "legal economy". The role of the main actors in the economy in the Soviet Union would be assumed by enterprises, concerns, joint ventures and co-operatives. The economic management functions currently carried out by ministries would be transferred to those bodies. As for the reaffirmation and strengthening of the jurisdictional immunities of States, efforts should, in his view, be directed at finding solutions of a pragmatic nature with a view to achieving a clear but flexible legal régime governing such immunities, with specific rules to govern all exceptions.

50. Turning to the draft articles, he said that article 1 was on the whole acceptable to him, since, in addition to defining the scope of the articles, it implicitly recognized that State immunity existed independently of the convention that was to be drawn up. That was a long-established and generally recognized principle of international law based on the sovereign equality of States which should, in his view, be reflected in unambiguous terms at the outset of the draft convention.

51. Articles 2 and 3 had the same objective, namely to define and clarify the terms used. In his view, the Special Rapporteur's proposals concerning article 2 could be adopted, bearing in mind the comments made by Bulgaria, the Byelorussian Soviet Socialist Republic, the German Democratic Republic and Mexico. It also seemed reasonable to adopt the Australian proposal to replace the word "State" by "forum State" or "foreign State", as appropriate. In paragraph 1 of article 3, the division of State organs into categories did not embrace all the existing forms of State. Also, the terms used in the provision—"agencies or instrumentalities of the State", "its various organs of government" and "political subdivisions of the State"—were unclear and did not facilitate an understanding of the term "State". In defining the content of that concept, it must be remembered that States exercised their international legal capacity through the activities of the bodies or persons representing them, whose powers were defined by national legislation. In order to carry out their functions, those organs and persons were vested with the sovereign authority of the State and were entitled to invoke jurisdictional immunity. On that basis, the Commission might wish to consider the definition of the term "State" proposed by the Byelorussian Soviet Socialist Republic, which read:

> "The 'State' means the State and its various organs and representatives which are entitled to perform acts in the exercise of the sovereign authority of the State." (A/CN.4/410 and Add.1-5.)

52. Furthermore, since, as pointed out by the Federal Republic of Germany and Australia in their comments on the articles, there were no specific provisions for federal States, clear provisions should be included in the definition of the term "State" with the effect of granting constituent units of federal States the same immunities as those of a central Government, without any additional requirement to establish sovereign authority. In that connection, the Soviet Union was interested in creating legal safeguards for the participation of the Union Republics and their State organs and institutions in international economic relations, one of the aims of the political reforms under way in his country being to vest the sovereignty of the Union Republics not only with a political, but also with an economic content. In that context, Soviet jurists considered that self-management and self-financing should apply not only to the Union Republics, but also to autonomous and administrative territorial entities.

53. He agreed with the comment made by the German Democratic Republic that article 3, paragraph 1, did not make it clear that State-owned self-supporting legal entities, which were established exclusively for the purpose of performing commercial transactions and which acted on

their own behalf, did not represent the State and were therefore not entitled to immunity in respect of themselves and their property, and also with its proposal for a new paragraph 2 (*ibid.*).

54. Under the terms of paragraph 2 of article 3, in determining whether a contract for the sale or purchase of goods or the supply of services was commercial, reference should be made primarily to the nature of the contract. The nature of the contract was thus being treated as the basic criterion and its purpose as an additional one. He believed that the purpose criterion was justified and should have its proper place in the draft, but was prepared, in the interests of arriving at agreed solutions, to subscribe to the views of Yugoslavia as to the possibility of using both criteria and giving them the required degree of importance. The proposal that a definition of the nature of the act at issue should be based on the law of the forum State rather than of the foreign State concerned was unwarranted, in his view. His stand was dictated in particular by the lack of any effective safeguards for the observance of the principle of equity which was broadly applied in the judicial practice of Western States. The declaratory requirement concerning the inadmissibility of the abuse of that right on the part of the forum State confirmed that his approach was justified.

55. He endorsed the Special Rapporteur's recommendation that the words "under international law" should be added in article 4, paragraph 1, to make it clear that the privileges and immunities referred to were recognized under international law.

56. The basic concept underlying article 6 was that a State enjoyed immunity from the jurisdiction of the courts of another State subject to certain exceptions. He agreed with the nine Governments referred to in the preliminary report (A/CN.4/415, para. 61) as favouring the deletion of the words "and the relevant rules of general international law". He was also persuaded by Brazil's argument that those words "might be interpreted as admitting that, in addition to the limitations and exceptions expressly contained in the articles, there are further unspecified conditions to be found in other rules of international law" (A/CN.4/410 and Add.1-5). Presumably, if there were any relevant rules of general international law, they would have to be taken into account; but it would be wrong to say that international law had not progressed sufficiently, while at the same time referring back to that law. The inclusion of the words in question would open the door to broad and arbitrary interpretations and to unilateral restrictions on the immunity of a State and its property, which would not be conducive to the further development of a clear legal régime.

57. With regard to article 7, he shared the doubts expressed concerning the expressions "interests ... of ..., [a] State" and "property in its ... control" and agreed with the Special Rapporteur that the Drafting Committee should examine those terms. The proposed new text of the article (A/CN.4/415, para. 79) was preferable, in his view.

58. He agreed with the new wording proposed by the Special Rapporteur for subparagraph (*c*) of article 8 (*ibid.*, para. 93). From the standpoint of legal guarantees, and in the context of the relations considered, it would be dangerous in practice to apply the concept of changed circumstances, which could result in abuse and instability in international economic and legal relations.

59. He also agreed with the opinion expressed by Mexico that it was necessary to provide in article 9 that the mere appearance of the representative of a State before a foreign tribunal in performance of the duty of affording protection to persons of the same nationality or with a view to reporting crimes or giving evidence in a case should not be deemed to constitute assent to the exercise by the court of jurisdiction over the State represented.

60. He further endorsed the new paragraph 4 proposed for article 10 (*ibid.*, para. 107) on the basis of the suggestion made by Thailand.

61. The title of part III of the draft raised the question of the choice between the words "limitations on" and "exceptions to". It was no simple drafting matter, for it affected the whole concept of jurisdictional immunities. His own feeling was that the words "exceptions to" more accurately reflected the content of the doctrine of immunity as understood by most countries. The fundamental principle of State immunity was the general *jus cogens* norm: there could be exceptions to that norm, but no limitations.

62. Article 11 would provide additional safeguards if, as suggested by the German Democratic Republic and the Nordic countries, it contained a rule concerning the jurisdictional link between the commercial contract and the State of the forum for the purpose of determining whether differences relating to commercial contracts fell within the jurisdiction of a court of another State. He noted in that connection that the position of the German Democratic Republic, as expressed in the proposal made in its comments and observations (A/CN.4/410 and Add.1-5), reflected the trend in private international law towards applying to contractual legal relationships a foreign law by application of the rules of conflict of laws. It seemed to him that, under the contemporary doctrine of conflict of laws of the Western and certain other countries, it was possible to do so if the transaction in question had a "close link" with a given legal system or if there was a "prevailing" interest in the application of the rules of the latter as opposed to those of the legal system by which the transaction was governed. Indeed, that criterion was acknowledged in the 1972 European Convention on State Immunity, whose main feature, according to Western writers, was recognition not of the doctrine of limited immunity, but of the territorial link necessary to establish jurisdiction for the purpose of recognizing and executing the decision handed down by the courts against a foreign State. Under the European Convention, any type of activity listed as an exception to immunity must have some kind of territorial link with the State before whose courts proceedings were taken to determine the jurisdictional basis of the claim in question.

63. The proposed new article 11 *bis*, on segregated State property (A/CN.4/415, para. 122), was particularly important, and the USSR Constitution of 1977 had been cited in that connection. It was important to remember that the Soviet Constitution was about to be amended, so that, as stated at the Congress of People's Deputies of the USSR currently meeting in Moscow, it should not be construed in isolation from the laws being adopted under the process of *perestroika*. The concept of segregated property reflected the current stage of *perestroika*, in particular in the area of foreign economic activity.

64. For the codification of the rules of international law on the immunity of the State, its organs and its property, it was the definition of what was understood by the State and State organs to which immunity should be granted which was of significance and that was of particular importance for socialist States where State-owned property was the predominant feature. In accordance with the fundamental principles of international law, the matter could be dealt with first on the basis of domestic legislation, in which case it was a matter for Soviet law which organization or instrumentality was to be considered as an organ of the Soviet State enjoying immunity. The trend towards decentralization of foreign economic activity in the Soviet Union, together with the restructuring of the whole system of economic management, had a direct bearing on that question, which could therefore not be considered outside the context of such profound changes. As part of that reform, foreign economic activity was being carried on directly by industrial enterprises and by scientific research and design organizations. Moreover, under the new arrangements, enterprises acquired legal personality when engaging in economic transactions and could therefore not be regarded as State organs enjoying immunity.

65. Furthermore, under the terms of the USSR's *State Enterprise (Association) Act*, which had entered into force on 1 January 1988, a State enterprise had a segregated part of the nationally owned property and its own independent balance sheet. Its property consisted of fixed and working capital, other tangible assets and financial resources, and it had the right to administer, use and dispose of its property. It was an independent legal entity. The State was not responsible for the obligations of the enterprise, and vice versa. The enterprise operated on principles of full accountability and self-financing. Under article 19 of the Act, the foreign economic activities of an enterprise were an important part of its entire operation. A major provision of the Act was that an enterprise which was a major supplier of goods or services for export might be granted the right to engage directly in export/import operations and also on markets in the capitalist and developing countries. Accordingly, a distinction had to be made between two types of State property: on the one hand, property which was directly administered by the State or its organs and which, regardless of the nature of the activity that was the subject of the claim against the State or its organs, enjoyed full immunity from foreign jurisdiction; and, on the other, segregated State property administered by State enterprises (associations), which were independent legal persons and did not enjoy immunity in the event of any claim against the enterprise before the courts of a foreign State.

66. Thus each State determined for itself the régime governing State property. The Soviet State, for its part, segregated part of that property, transferring it to State legal persons, including enterprises, or granting the latter certain property rights. Only in cases relating to the obligations of the enterprise did its property not enjoy immunity with respect to the preliminary submission of a claim or the enforcement of a decision. However, if a plaintiff applied for attachment of the property of a State enterprise in a claim brought not against the enterprise, but against some other legal person or the State itself, no proceedings could be taken against such property, for in such cases the Soviet State was entitled to plead that the State property enjoyed immunity.

The meeting rose at 1.10 p.m.

2117th MEETING

Tuesday, 13 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/422 and Add.1,[3] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[4] ON SECOND READING (*continued*)

1. Mr. BARSEGOV, continuing the statement he had begun at the previous meeting, said that, in the case of the Soviet Union, State property administered by foreign trade organizations or industrial enterprises did not enjoy immunity in the event of an action brought against the organization or enterprise in connection with its statutory activity. That was, however, not the case in the opposite situation, where, if the property was attached as State property, it could no longer be segregated from socialist State property. Like any other State property, namely non-segregated property, such property enjoyed immunity. In that connection, he said that the proposed new article 11 *bis* (A/CN.4/415, para. 122) contained a legal inaccuracy; contrary to what it stipulated, a State enterprise did not enter into a contract "on behalf of a State". In the light of those considerations, he proposed the following alternative text for article 11 *bis*:

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

[2] *Ibid.*

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

[4] For the texts, see 2114th meeting, para. 31.

"1. If a State enterprise enters into a commercial contract with a foreign juridicial or natural person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of the other State, the State enterprise (State juridical person) shall not enjoy immunity from jurisdiction in a proceeding arising out of that commercial contract.

"2. Paragraph 1 shall not apply when the action is brought not against the State juridical person which has entered into a commercial contract with a foreign natural or juridical person, but against some other enterprise of the same State or against that State itself. Furthermore, the provisions of this article shall not apply when the action is brought in connection with extra-contractual relations.

"3. Paragraph 1 shall not be applied by the State of the forum if, in corresponding cases, jurisdictional immunity is granted in that State to State juridical persons."

2. Such provisions did not appear to be in contradiction with those of national legislation in the matter. In support of that comment, he referred to section 1603 (*a*) of the United States *Foreign Sovereign Immunities Act of 1976*, which contained the following definition of a "foreign State":

A "foreign State" . . . includes a political subdivision of a foreign State or an agency or instrumentality of a foreign State . . .

That provision was explained by section 1603 (b), which read:

An "agency or instrumentality of a foreign State" means any entity

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign State or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign State or political subdivision thereof . . .

. . .

In jurisdictional practice, United States courts recognized the status of State agencies as State enterprises without any problem. There were also no particular problems with regard to the recognition as foreign States of enterprises of which the State was the sole owner.

3. He had taken note with great interest of the statements made by the members of the Commission who had already spoken on the question and, in particular, of that by Mr. Shi, who had also proposed a new article 11 *bis* (2115th meeting, para. 24). There was no doubt that his proposal, like the others made in that regard, would pave the way for broad agreement on the content of that article.

4. Mr. SEPÚLVEDA GUTIÉRREZ, noting that the Special Rapporteur's work was bringing the Commission closer to a consensus, said that he would refer only to the controversial aspects of articles 1 to 11.

5. Article 1 was acceptable and the Special Rapporteur had been right not to add anything to the text adopted on first reading, which had the merit of brevity.

6. It would be logical to merge articles 2 and 3 because they dealt with interrelated questions of terminology, and the title of article 3, "Interpretative provisions", would have given rise to some discussion. He therefore agreed with the way the Special Rapporteur had resolved the problem in his preliminary report. However, the proposed new text (A/CN.4/415, para. 29) called for some comments. For example, paragraph 1 (*b*) (ii) should be worded more precisely in order to avoid the doubts and confusion to which it could give rise. In Spanish, there might be a better way of saying *realizar actos en ejercicio de las prerrogativas del poder público*. Paragraph 3 should also be amended to indicate clearly that it referred to contracts concluded for a public purpose.

7. Although he agreed in principle with the proposed new text of paragraph 1 of article 4 (*ibid.*, para. 50), he believed the article did not really have a place in the draft and shared the doubts expressed in that regard by Mr. Mahiou at the previous meeting.

8. The safeguard clause at the beginning of article 5 was necessary, since there were cases in which retroactivity could have beneficial effects. In the absence of such a clause, a State party in whose territory proceedings were being conducted in connection with immunities which that State did not recognize would still have to abide by the régime established in the future convention.

9. With regard to article 6, which was the key provision in the system of immunities, he agreed with several previous speakers and with the Special Rapporteur that the words in square brackets should be deleted because of the problems to which they gave rise. The new article 6 *bis*, proposed by the Special Rapporteur as a possible compromise solution in his second report (A/CN.4/422 and Add.1, para. 17), created more problems than it would solve.

10. He supported the proposal by Australia to use the expressions "forum State" and "foreign State" in article 7 and was in favour of the new text proposed by the Special Rapporteur (A/CN.4/415, para. 79), which was shorter and clearer than the adopted text.

11. He endorsed the suggestion that, in article 8 *(c)*, the words "formal and written" or an equivalent expression should be added before the word "declaration". For the sake of greater clarity, moreover, the word "matter" in the introductory clause should be replaced by "dispute".

12. He also supported the new text of article 9 proposed by the Special Rapporteur (*ibid.*, para. 100), despite the words "at the earliest possible moment", at the end of paragraph 1, which were much too vague for a legal instrument. The Drafting Committee would no doubt find better wording.

13. The new paragraph 4 proposed for article 10 (*ibid.*, para. 107), was acceptable and made the article more precise.

14. Article 11 must clearly explain the concept of a "State enterprise" and should be kept in line with the other relevant provisions of the draft. The amended text proposed for paragraph 1 (*ibid.*, para. 121) was acceptable, but it stood in need of some improvement. He could not agree, however, to the proposed new article 11 *bis* (*ibid.*, para. 122), because the doctrine of segregated State property was not yet recognized in all countries. The Commission would have to consider it in depth if it was to protect the rights of certain countries, particularly those of the third world. He would have to look at Mr. Barsegov's proposal for article 11 *bis* (para. 1 above) more closely before he could take a decision on it.

15. Lastly, he proposed that articles 1 to 11 be referred to the Drafting Committee.

16. Mr. THIAM paid tribute to the Special Rapporteur and said that, at present, he did not wish to refer to questions of principle which had already been discussed at length. Instead, he would make a few comments on some of the draft articles.

17. He agreed with the wording of article 3, but, in order to take account of the systems of public law in force in certain countries, he would like it to list the various subdivisions of the State and, in particular, the administrative subdivisions—communes, departments, etc.—which were entitled to perform acts in the exercise of sovereign authority. As to the character of a contract, he noted that it was usually defined in terms of its nature, but he could agree to the concept of purpose being brought into play. The State would, however, have to say so expressly, because the principle was that the nature of the contract prevailed.

18. With regard to article 4, he said that there were major differences between immunity from jurisdiction and diplomatic immunity. The latter, which was linked to the diplomatic function and limited in time, differed in nature from jurisdictional immunity. It also had a different purpose, namely to guarantee the free exercise of the diplomatic function and to ensure the independence of the diplomat and the freedom without which he could not carry out his mission. Naturally, it involved immunity from jurisdiction as well, but such immunity was provisional and protected the diplomat only in the exercise of his functions. Immunity from jurisdiction was linked to the very sovereignty of the State: it was permanent and did not depend on changes of Government. Article 4 thus dealt unnecessarily with certain questions and might even create confusion. For example, why mention the privileges and immunities of heads of State, which were irrelevant to the issue? The wisest course would be to delete the article.

19. Referring to article 6, he said that he did not wish to reopen the theoretical—and virtually deadlocked—discussion of the question whether immunity was or was not a principle of international law; he preferred to confine himself to practical matters. In that connection, the Commission must not forget that States always tried to find the most convenient and most specific solutions to problems arising out of the organization of their relations and that they did so on the basis of reciprocity. The words in square brackets were ambiguous and could lead to disagreement. Their deletion would do no harm.

20. Article 7 was also unnecessary and its title difficult to understand. Moreover, a look at the elements composing the text showed that paragraph 3 referred to the "organs" of a State, whereas the term "State" had been defined in an earlier article.

21. He was not clear about the meaning of the new paragraph 4 proposed for article 10 (A/CN.4/415, para. 107). Why should the amount of the counter-claim be limited? It was logical to require the existence of a legal relationship between the two claims, but not to prevent one State from claiming more than the other State concerned. He referred to the case in which a wrongful act had caused different amounts of harm to States A and B and where State A would be prevented from claiming reparation for the harm which it had suffered—which was greater than that sustained by State B—by entering a counter-claim seeking relief exceeding in amount that sought by State B. A provision which would have such an effect must be deleted.

22. The proposed new article 11 *bis* (*ibid.*, para. 122) raised thorny matters of principle which he had not had enough time to consider, particularly since the suggested alternatives, especially the proposal by Mr. Shi (2115th meeting, para. 24), had not yet been translated into French. He therefore reserved his position on that point.

23. Mr. NJENGA said that the texts which the Special Rapporteur was proposing on the basis of the comments and observations of Governments to improve on the draft articles adopted on first reading would be of considerable assistance to the Commission in its work. He was particularly grateful to the Special Rapporteur for the theoretical analysis he gave of the evolution of the concept of jurisdictional immunity of States and their property and of the juridical basis for the theories of absolute immunity and restricted immunity. Although the second reading was not the appropriate time to enter into a "theological" debate on the basis of jurisdictional immunities, he wished to state that, in his view, the case-law, State practice and national legislation cited by the Special Rapporteur did not justify the conclusion he reached in his second report that

> the doctrine of absolute immunity has gradually given way to a doctrine of restricted immunity, and therefore it now appears that there is no existing rule of customary international law which automatically requires a State to grant jurisdictional immunity to other States in general terms. ... (A/CN.4/422 and Add.1, para. 4.)

24. The examples given by the Special Rapporteur (*ibid.*, paras. 7-8) were fairly recent, such as the "Tate letter" of the State Department of the United States of America (1952), *The "Philippine Admiral"* case (1975) and the *Danish State Railways in Germany* case (1953), but they were all taken from one part of the world, namely the Western industrialized countries. The domestic legislation cited was also recent: the United States *Foreign Sovereign Immunities Act* had been enacted in 1976, the United Kingdom *State Immunity Act* in 1978 and similar legislation in Singapore in 1979, in Pakistan in 1981, in South Africa in 1981, in Canada in 1982 and in Australia in 1985. If anything, all those texts could be regarded as a departure from the rule of absolute immunity, which continued to enjoy the support of the overwhelming majority of the international community, including the developing countries. He categorically refuted the view which G. M. Badr had expressed in 1984 in his book, *State Immunity: An Analytical and Prognostic View*, and which had been cited by Mr. Mahiou (2116th meeting), namely that the Asian-African Legal Consultative Committee subscribed to the theory of restricted immunity. The fact was that, at its 1985, 1986 and 1987 sessions, the Committee had held extensive discussions on what it considered to be the unjustified erosion of the jurisdictional immunity of States as a result of the recognition of extraterritorial jurisdiction by the United States *Foreign Sovereign Immunities Act of 1976*. Moreover, that Act had been the subject of a meeting in 1983 of the legal advisers of the member States of the Committee, who had reached the conclusion that, in view of differences in State practice and the growing trend towards the enactment of national legislation restricting immunity, it was desirable that the law on the subject should

be codified by the Commission in order to achieve a uniform approach to the application of the rule of sovereign immunity.

25. Commenting on part I of the draft (Introduction), he said that he endorsed the Special Rapporteur's proposal to merge article 2 (Use of terms) and article 3 (Interpretative provisions) in a single article 2 entitled "Use of terms". With regard to the definition of the word "court" in paragraph 1 (*a*) of article 2, he noted that, in some countries, judicial functions also covered functions carried out by organs of the State other than courts. The Special Rapporteur might wish to consider the definition of the term contained in Australia's *Foreign States Immunities Act 1985*, section 3 of which provided that a "court" included a tribunal or other body, by whatever name it was called, that had functions or exercised powers that were judicial functions or powers or were of a kind similar to judicial functions or powers.

26. The Special Rapporteur was to be commended for his efforts to ensure that the expression "commercial contract" did not extend to governmental transactions for public services which were essentially sovereign acts and must continue to enjoy immunity. Paragraph 3 of the new article 2 (A/CN.4/415, para. 29) was an improvement on the text adopted on first reading (para. 2 of former article 3) in that it provided for the application of two criteria: the nature of the contract and the purpose of the contract. As drafted, however, the purpose test would apply only "if an international agreement between the States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose". In his view, that was an unduly restrictive application of the purpose criterion, for, even without an explicit stipulation, it might be obvious that certain transactions, such as those entered into in the event of floods, emergency relief or immunization campaigns, were for public purposes.

27. Turning to part II of the draft (General principles), he said that the proponents of the absolute theory of jurisdictional immunity and the supporters of the restrictive theory agreed on the existence of customary norms in the matter, based on the sovereign equality of States. In a world characterized by different social, economic and political systems, States could not maintain harmonious relations if every State seized each opportunity to exercise its jurisdiction over the legitimate activity of other States within its territory. It was therefore essential for the Commission to state the basic and definitive principle of State immunity and to secure its universal application. That principle should not be subject to the so-called "relevant rules of general international law", which were undefined—if indeed they existed. He therefore welcomed the proposal to delete the bracketed phrase in article 6 (State immunity). The article as thus amended would provide for a régime that would not be rigid or immutable and that would be applied in a non-discriminatory manner in accordance with article 28, paragraph 1, and on the basis of reciprocity, in accordance with article 28, paragraph 2. Provision could also be made for particularly favourable régimes which could be applied within a region or subregion on the basis of specific agreements.

28. He would, however, caution against a multiplicity of régimes based on the principle of reciprocity and on a restrictive application of the articles, which was inherent in the new article 6 *bis* proposed by the Special Rapporteur (A/CN.4/422 and Add.1, para. 17). In his view, that article would be a significant obstacle to the formulation of an objective criterion for State immunity and he would therefore oppose it. Any exceptions to State immunity agreed on by the Commission should be spelled out in part III of the draft; and any exceptions which might become necessary in the future could be the subject of an additional protocol amending the future convention.

29. He could accept the minor changes which had been proposed by the Special Rapporteur in article 7 (Modalities for giving effect to State immunity) and which consisted of replacing the expressions "State" and "another State" by "forum State" and "foreign State", respectively, and of simplifying paragraph 3. He also supported the proposed new text of subparagraph (*c*) of article 8 (A/CN.4/415, para. 93), which underlined the voluntary nature of the submission of a dispute to local jurisdiction.

30. Again, he could accept the text proposed for article 9 (*ibid.*, para. 100), which was based on the theory of implied consent to the exercise of jurisdiction by virtue of prior participation in a proceeding. He considered, however, that the Special Rapporteur had been right to qualify that rule in cases where the State took a step relating to the merits before it had knowledge of facts on which a claim to immunity might be based. He thus agreed with the proposed addition to paragraph 1 (*b*), on the basis of article 3, paragraph 1, of the 1972 European Convention on State Immunity.

31. He would like some clarification concerning the proposed new paragraph 4 of article 10 (*ibid.*, para. 107), the wording of which should, in any event, be improved.

32. It was futile, in his view, to dwell at the present stage on the choice of a title for part III of the draft ([Limitations on] [Exceptions to] State immunity). Once a satisfactory compromise had been reached regarding the types and nature of the situations in which State immunity should not be invoked, it would be of little significance whether the word "limitations" or the word "exceptions" was used.

33. With regard to article 11 (Commercial contracts), he believed that, properly delineated, commercial activity was an area in which State immunity should not be invoked by a foreign State engaged in trade or commerce to oust the jurisdiction of the forum State. While he welcomed the new text proposed for paragraph 1 (*ibid.*, para. 121), there would be practical difficulties in applying the "applicable rules of private international law", owing to the differences that might arise as to whether the decisive factor was the *lex loci contractus*, the *lex domicilii* or the *lex situs*. As some Governments had suggested, it might be preferable to include in the article a rule pertaining to the jurisdictional link between the commercial contract and the forum State. Furthermore, paragraph 2 (*a*) should also cover financial and commercial agreements concluded between States and international organizations such as IMF, the World Bank and the African Development Bank.

34. Referring to the proposed new article 11 *bis*, on segregated State property (*ibid.*, para. 122), he said that, while the Special Rapporteur was to be commended on his willingness to accommodate different social and economic systems in a flexible and fair manner, it was the generally accepted view that State trading agencies enjoying separate

legal personality should neither seek nor receive immunities. Notwithstanding the explanations given by Mr. Shi (2115th meeting) and Mr. Barsegov concerning the operation of such State agencies in the socialist countries, the concept of "segregated State property" remained elusive to many and the word "segregated" itself was not felicitous. He would point out that, in most developing countries, there were similar agencies, with independent legal personality and financial autonomy, which would not be eligible to claim State immunity and in whose name the State should not be impleaded. The concept of "segregated State property" and the formulation of article 11 *bis* therefore required further clarification inasmuch as the question of immunity was perhaps being confused with the question of the party against which to take legal action. It should be made clear that, in the cases covered by the article, the courts of the forum State would have the right to bring a claim against a State enterprise, but not against the State itself. The wording suggested by Mr. Shi (*ibid.*, para. 24) was an improvement on the text proposed by the Special Rapporteur, but, for the sake of clarity, it would perhaps be advisable to replace the word "unless", in paragraph 1, by "if". He also found the wording proposed by Mr. Barsegov (para. 1 above) interesting, but he wondered whether paragraph 3 was really necessary.

35. He agreed with the Special Rapporteur that the words "and is covered by the social security provisions which may be in force in that other State", in paragraph 1 of article 12 (Contracts of employment), should be deleted. He was, however, not persuaded of the advisability of deleting subparagraphs (*a*) and (*b*) of paragraph 2, since they dealt with well-established situations of State immunity.

36. He doubted whether the exception provided for in article 13 (Personal injuries and damage to property) would be acceptable in principle. There was a paucity of judicial decisions in that regard and he was not persuaded by the argument that the dignity of the State would not be impugned, as insurance companies would, in most cases, meet the claim for personal injury. It was often said that it would be unfair to deny redress to a person who suffered personal injury or damage to his property at the hands of a foreign State; that was a weighty argument. The same could, however, be said of injury caused by a diplomatic agent, and it would be somewhat bizarre to justify diplomatic immunity for the agents of the State, but to deny that same immunity to the State itself. To say that was not to exclude responsibility, however. An act or omission resulting in personal injury or damage to property might constitute an internationally wrongful act for which the author State was liable under international law. It was in that connection that he supported the Special Rapporteur's proposal for the addition of a new paragraph 2 (A/CN.4/415, para. 143). Since the principle stated therein was of general application, however, the provision might be best reflected in the preamble.

37. Article 14 provided for an exception to immunity based on the well-established principle of the sovereign authority of the forum State in matters of ownership, possession and use of property. However, he endorsed the Soviet Government's view that paragraph 1 (*c*), (*d*) and (*e*) could open the door to foreign jurisdiction even in the absence of any link between the property and the forum State. He therefore supported the Special Rapporteur's proposal that those subparagraphs be deleted.

38. Article 15 (Patents, trade marks and intellectual or industrial property), which was an extension of articles 11 and 14, was generally acceptable and he supported the Special Rapporteur's proposal that it be explained in the commentary that the words "any other similar form of intellectual or industrial property" covered new categories of intellectual property, such as plant breeders' rights.

39. Article 16 (Fiscal matters) was also acceptable to him, subject to an explanation in the commentary that the article did not apply to State property used for diplomatic or consular purposes. He had no comment on article 17 (Participation in companies or other collective bodies), since a State which chose to enter into business with a company or commercial body in the forum State must be presumed to have accepted the jurisdiction of that State.

40. He broadly supported article 18 (State-owned or State-operated ships engaged in commercial service), but considered that the Special Rapporteur's proposal to delete from paragraphs 1 and 4 the term "non-governmental", which had been a source of controversy in the past, would represent a serious erosion of jurisdictional immunity and would frustrate the efforts of many developing countries which were trying to establish national shipping lines as a matter of national policy and not only for commercial purposes.

41. He would urge caution in drafting article 19 (Effect of an arbitration agreement), which provided for an exception to immunity in connection with the supervisory role exercised by the courts of the forum State in arbitration. Parties usually opted for arbitration in preference to judicial proceedings because it saved time and expense and they were free to choose not only the panel of arbitrators, but also the applicable law. All those advantages would be lost if a court were subsequently required to pass judgment on the validity of the arbitration agreement, the procedure and the award itself. Of course, resort to judicial organs could be expressly excluded under the arbitration agreement, but the legality of such a clause could also be the subject of judicial proceedings. The Commission should perhaps at least make more specific provision for such a possibility. In any event, he was not in favour of the Special Rapporteur's proposal to extend the scope of the article to differences relating to a "civil or commercial matter".

42. The Special Rapporteur had rightly noted, with regard to article 20 (Cases of nationalization), that the Commission had not been requested to express a legal opinion on the extraterritorial effects of measures of nationalization. For his own part, he saw no reason to retain the article, particularly since, as the Government of Thailand had observed, it had no connection with part III of the draft.

43. Turning to part IV of the draft (State immunity in respect of property from measures of constraint), he said it was a well-established principle of international law that waiver of immunity, express or implied, with regard to the adjudication of a dispute by a foreign court did not necessarily amount to waiver of immunity of State property from attachment, seizure or execution. That principle would apply even in the situations of exemption from immunity contemplated in the draft articles. It would not be conducive to harmonious State relations to subject State property to measures of constraint and, to the extent that article 21 stated that rule of immunity, it was acceptable. He was not, however, persuaded that there should be any exception

to that rule. Any measure of constraint was likely to strain inter-State relations and the best way of enforcing court decisions against States would, in his view, be through diplomatic channels. A State was of course free to give its consent to measures of constraint in writing, in a treaty or in a convention, but such consent had to be express. Subject to that condition, he supported article 22 (Consent to measures of constraint). He also supported article 23, which listed the categories of property that could on no account be the subject of measures of constraint. With regard to the term "non-governmental" in paragraph 1, however, he would refer members to his remarks on article 18.

44. Lastly, with regard to part V of the draft (Miscellaneous provisions), he generally supported articles 25 (Default judgment), 26 (Immunity from measures of coercion) and 27 (Procedural immunities), but reserved the right to revert to those matters in the light of the debate.

45. Mr. AL-QAYSI, commenting on articles 12 to 20, said that the formulation of those provisions gave the Commission an opportunity to work out the compromise solutions needed for the achievement of wider acceptance by States of the draft articles as a whole. He was convinced that the Commission would not fail in its efforts to achieve that goal.

46. He shared the Special Rapporteur's view that the reference to social security provisions in article 12, paragraph 1, was neither effective nor necessary. He had doubts, however, whether, if the article were retained, subparagraphs (*a*) and (*b*) of paragraph 2 should likewise be deleted. In the light of the Special Rapporteur's comments on the draft as a whole and on those subparagraphs in particular, the texts in question seemed to be well-founded and to leave no ambiguity. The fear that the expression "governmental authority" might lead to excessively broad interpretations could arise in connection with similar expressions in other articles as well, but clear and succinct commentaries would suffice to remove any ambiguity.

47. With regard to article 13, he said that a close analysis of the Special Rapporteur's exposé in his preliminary report (A/CN.4/415) and his second report (A/CN.4/422 and Add.1) revealed many loose ends. For example, although the scope of the article had been narrowed down in 1984 to cover traffic accidents, it was now proposed to delete the second territorial limitation—that of the presence of the author of the act or omission in the territory of the State of the forum at the time of the act or omission. Was that conceivable? Could a traffic accident be committed by remote control or by correspondence? Again, were there to be two standards of attribution of wrongful acts to States, as seemed to be envisaged—one as a general requirement of State responsibility and the other for the purposes of article 13? If so, what was the foundation for the distinction and what would its consequences be? The article also gave rise to other difficulties, in particular those referred to in the comments made by the Soviet Union and the German Democratic Republic. Moreover, the Special Rapporteur took the view that the Commission "should reconsider the scope of the article in the light of the fact that liability cases connected with criminal offences have thus far been very few in practice" (*ibid.*, para. 22). The choice seemed to be between giving the article a broad scope—a solution which, as the Special Rapporteur rightly noted, would not receive support from a significant number of States—or a scope explicitly limited to traffic accidents, for which, as the Special Rapporteur again rightly indicated, insurance coverage would be sought and in which case there would therefore be insufficient substance to warrant a separate article. In view of those uncertainties, he had strong doubts about the usefulness of such a provision in the form proposed by the Special Rapporteur.

48. Concerning article 14, he endorsed the Special Rapporteur's proposal to delete subparagraphs (*b*) to (*e*) of paragraph 1. As to article 15, the reasoning adopted by the Special Rapporteur in explaining its substance was well taken.

49. He had not yet reached any conclusion on article 16. On the one hand, he sympathized to some extent with Mr. Shi's reasoning (2115th meeting), but, on the other, he considered that the addition to the article—should its substance be acceptable—of a reference to international agreements in force between the two States concerned, as suggested by Spain, merited approval.

50. With regard to article 18 (State-owned or State-operated ships engaged in commercial service), he agreed that the term "non-governmental" in square brackets in paragraphs 1 and 4 should be deleted for the reasons advanced by the Special Rapporteur in his two reports. He also considered that the proposed new paragraph 1 *bis* (A/CN.4/422 and Add.1, para. 26) would, subject to drafting refinements along the lines of those to be agreed on for the proposed new article 11 *bis*, serve to bridge differences. A point on which clarification by the Special Rapporteur seemed to be necessary was the comment in his second report that paragraph 6 "should be redrafted because it could be misinterpreted to the effect that States may plead all measures of defence, prescription and limitation of liability only in proceedings relating to the operation of the relevant ships and cargoes" (*ibid.*, para. 25). The provisions of paragraphs 1 and 4 dealt precisely and exclusively with proceedings relating to ships and cargoes and it was difficult to see how there could be any misinterpretation. In the light of the Special Rapporteur's reasoning in his report (*ibid.*, paras. 28-31), he fully endorsed the conclusion that no special provision concerning aircraft should be added to article 18.

51. Like the Special Rapporteur, he preferred the expression "civil or commercial matter" in article 19 (Effect of an arbitration agreement), because it was more comprehensive than the expression "commercial contract" and should not give rise to problems since the subject-matter to be referred to arbitration was to be determined in an agreement. As referral to arbitration had to be made by agreement, there seemed to be no reason why the provisions of article 19 should be tied to the exception based on the commercial nature of contracts. With regard to the question whether, as the Special Rapporteur suggested, a new subparagraph (*d*) relating to the recognition of the award should be added, on the understanding that it should not be interpreted as implying waiver of immunity from execution, he accepted the suggestion, provided that the understanding was explicitly incorporated in the new text.

52. Despite the Special Rapporteur's reasoning in his second report (*ibid.*, para. 41), he was not convinced that article 20 should appear as an exception to State immunity in part III of the draft. Even in the hypothetical case

envisaged by the Special Rapporteur concerning the relationship between article 20 and article 15 (*b*), it was not clear whether the reissuing of the patent by the patent office of State Y for State X would not, on the basis of article 15 (*b*), make State X the owner of the protected right in the State of the forum. In any event, if it was considered that the substance of article 20 should be included, the appropriate place for it would be in part I of the draft.

53. In conclusion, he noted that the Commission seemed to be rushing through the second reading of the draft articles, despite their complexity and even though many members rightly considered that some of the articles required further in-depth consideration. It was to be hoped that, at future sessions, the Commission would allow time for thorough consideration of the most controversial articles before referring them to the Drafting Committee; it would then be able to provide the Committee with more specific guidelines.

54. Mr. BENNOUNA, after paying tribute to the Special Rapporteur for the way in which he had, in accordance with his country's philosophical traditions, avoided controversy, bridged opposing positions and displayed a pragmatic approach, said that he had no intention of reopening discussions of a theoretical or doctrinal nature that were hardly to the point in connection with the task of drafting a convention intended to be acceptable to the largest possible number of States. In the case of a topic which had taken shape in the practice and case-law of different national legal systems, it would not be possible in any event to find a doctrine or basic principles that were common to all those systems. What the Commission could do was to proceed pragmatically and propose some elements of compromise to meet the needs arising out of the growing interdependence of States in their economic and trade relations. It should also set aside the distinction between developed and developing countries and, instead, take account of the balance of power and the effect of different degrees of power on the rules it was formulating.

55. In accordance with the decision taken, he would confine his comments for the time being to articles 1 to 11, with regard to which he approved of most of the drafting improvements proposed by the Special Rapporteur.

56. The Special Rapporteur's proposal to combine articles 2 and 3 was acceptable. He nevertheless had some doubts about the wisdom of including representatives of the State in the definition of the State, as was done in paragraph 1 (*b*) (iv) of the new combined article 2 (A/CN.4/415, para. 29). The difference between "representative" and "represented" was a basic one and any confusion between the immunities of the State and those of its representatives, such as diplomatic and consular immunities, should be avoided.

57. With regard to paragraph 3 of the new article 2, relating to the definition of a commercial contract, he was in favour of maintaining the objective criterion of the nature of the contract and mentioning the purpose of the contract only as an additional factor of interpretation if the first criterion was insufficient or inapplicable. There was no point in referring to the hypothetical case of an international agreement between the States concerned, for, if such an agreement existed, the court would have to take it into consideration in any event. Moreover, a vague reference to a public purpose could be included in a contract without changing its purely commercial nature. However, if a State was acting in the exercise of its sovereign authority—such authority being outside the scope of ordinary law—it could agree with its contractual partner to have a provision to that effect included in the contract and thus become expressly entitled to jurisdictional immunity.

58. He agreed with several other members that the words in square brackets in article 6 should be deleted. The Commission could not take back with one hand what it was giving with the other; it could not state a legal rule of immunity and then empty that rule of its substance by referring to "the relevant rules of general international law", which were, in fact, no more than the rules defined by each State within its own legal system. The Special Rapporteur had rightly acknowledged that fact in his oral introduction and in his preliminary report (A/CN.4/415). The adoption of the proposal by Spain that the reference to general international law be included in the preamble would amount to letting in through the window what had been thrown out of the door. Compromises of that kind might be warranted in a resolution or a declaration of a political nature, but they had no place in a draft convention.

59. The new article 6 *bis* (A/CN.4/422 and Add.1, para. 17), which the Special Rapporteur was proposing by way of a compromise and which was based on the legal technique of reservations and objections to reservations, was designed to enable States to propose new provisions and exceptions even if they were not included in the convention and had not been negotiated. In his view, such a provision would upset the balance of the draft and change its overall structure and, instead of establishing a universal régime, might give rise to a large number of different types of bilateral practice. It also failed to take account of the balance of power he had already mentioned, in other words the pressures which the most powerful States could bring to bear in order to make other States accept their reservations for fear of being denied contracts they needed for their economic development. He was therefore unable to accept the Special Rapporteur's proposal, however well-intentioned it might be.

60. Referring to article 10, he regretted that, on the basis of a suggestion by Thailand, the Special Rapporteur was recommending the addition of a new paragraph 4 designed to limit immunity by a further condition relating to the amounts of the claim and the counter-claim. That was altogether unacceptable, since a State would have only to make a counter-claim in an amount exceeding that of the main claim in order to prevent the court from dealing with the matter. As Mr. Thiam had said, it should be enough that claims were of the same nature, were related to the same facts and were based on the same legal relationship.

61. With regard to the title of part III of the draft, he had no preference for either of the expressions in square brackets. He called on the Special Rapporteur to show imagination and pragmatism in order to find as neutral an expression as possible and said that he was prepared to help in that task.

62. Lastly, the proposed new article 11 *bis* (A/CN.4/415, para. 122) met the concerns of certain States and was to be welcomed for that reason. However, he considered the text unacceptable in its present form. The situation it envisaged was purely theoretical; an enterprise of the type

referred to would not be empowered to conclude a contract on behalf of the State. If the intention was to introduce a safeguard clause—and, on the face of it, article 3 would be the correct place for such a provision—it might be possible to adopt the proposal of the German Democratic Republic by specifying in the article on the use of terms that a State enterprise subject to the same rules and obligations of trade law as a private natural or juridical person should not, for the purpose of the present articles, be considered to be acting on behalf of the State. However, if States were not satisfied with such a solution, he would not object to the adoption of a new provision along the lines of those proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (para. 1 above).

63. Mr. Sreenivasa RAO said that the establishment of the proposed régime called for a less doctrinaire and more pragmatic approach based on a number of principles.

64. The first principle was the need to protect the sovereign immunity of States and their organs, including the constituents of federal States and their organs, in international relations.

65. Secondly, it had to be ensured that any differences and disputes arising from commercial transactions, namely transactions involving exchanges of goods and services for monetary consideration, were subject to the law and courts of the forum State where the obligation to perform the contract was at issue.

66. Thirdly, in determining what constituted a commercial transaction, due weight had to be given not only to the nature of the contract, but also to the purpose of the transaction, the nature of the contract being appreciated in the light of circumstances and context.

67. Fourthly, where the forum State and the foreign State had entered into an agreement recognizing the purpose of the contract to be one of public interest and not of commerce, even if goods and services were exchanged for monetary consideration, any differences and disputes that might arise from the contract had to be subject to negotiation and agreement between the two States, the rights and interests of private parties being underwritten by the forum State. The foreign State in such a case should have the obligation to settle the matter to the satisfaction of the forum State in return for the jurisdictional immunity it enjoyed.

68. Fifthly, the necessary compromise formulations had to be found so that the draft articles would be widely acceptable and the Commission could succeed in establishing a universally recognized legal régime which would lend stability and security to international relations and transactions. The law of sovereign immunities had recently been subject to an admittedly limited number of attacks that took the form of national laws and judicial decisions which it was being sought to portray as representing the current state of the law or, at any rate, as a basis for the progressive development of international law. That tendency towards the unilateral interpretation of a body of laws affecting all States had to be arrested by the adoption of an international régime which was clear, comprehensive and based on consensus.

69. In the proposed new text of article 2 (A/CN.4/415, para. 29), where the definition of the terms "court" and "State" seemed to give rise to some problems, it would be desirable to avoid formulations such as "political subdivisions" and "agencies or instrumentalities" of the State, which apparently created more problems than they solved. The definition of the expression "commercial contract", in paragraph 1 (*c*), was acceptable, provided that the need to give due weight to the purpose of the contract was appropriately emphasized in the commentary. He welcomed paragraph 3 for the same reasons he had given in his general comments, and because it would promote consensus.

70. The provisions of article 3 should indeed be incorporated in article 2, but paragraph 2 of article 3 was confusing and therefore open to criticism. The general rule in question was that if, in the practice and policy of the foreign State, an activity was considered to be commercial, that State should not seek immunity from the jurisdiction of the courts of the forum State for claims and counter-claims involving the same type of activity. That was a rule of fairness, of estoppel and even of reciprocity and it should either be stated forthrightly or, in order to promote consensus, paragraph 2 should be deleted. The text proposed by the Special Rapporteur for paragraph 3 of the new article 2 dealt with a different situation and could not serve as a substitute for paragraph 2 of article 3.

71. Article 4 also gave rise to some problems. In his opinion, there was no need to deal with the question of diplomatic immunities in draft articles on sovereign immunity: those were two entirely different fields. A general statement in the preamble referring to the immunities recognized in the relevant conventions codifying diplomatic and consular law would suffice. The immunities referred to in paragraph 2 of article 4 should be extended not only to heads of State, but also to heads of Government and ministers for foreign affairs. In that connection, he did not share the hesitation of the Special Rapporteur, who said in his preliminary report that those privileges were accorded "rather on the basis of international comity than of established international law" (*ibid.*, para. 49).

72. Article 5, on non-retroactivity, should be looked at again in terms both of drafting and of substance. The idea involved was a simple one: if, in certain places, the draft articles incorporated or reflected principles of customary international law on the topic under consideration, they would apply even in cases which had arisen prior to their adoption—otherwise, they would not be retroactively applicable. That must be stated. Moreover, no harm would be done if article 5 were deleted, since an agreement or convention would normally come into operation as between the parties only after it had entered into force, subject to the operation of the principles of customary international law that were incorporated therein, provided that they were not controverted.

73. In article 6, the words in square brackets, "and the relevant rules of general international law", should be deleted. It was not a healthy practice to refer to those "relevant rules" whenever the Commission had some doubt about the acceptability of a provision. That solution only underlined the lack of agreement among States and served to promote differences of interpretation, and that was contrary to the objective of establishing a universally acceptable régime. Moreover, as Mr. Mahiou (2116th meeting) had explained and the Government of Cameroon had

pointed out, in the present state of affairs international law supported the principle of the sovereign immunity of States and permitted only limited exceptions.

74. The proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17) did not serve any useful purpose. It dealt with a special case reminiscent of the reciprocity situation referred to in paragraph 2 of article 28, on non-discrimination. The question was whether special régimes should be provided for and recognized in the draft articles.

75. He was also not sure whether article 7 was really necessary. It appeared to duplicate the provisions of articles 1 and 2 and to state only what was already obvious. In any case, as it now stood, it gave rise to problems of interpretation; it should be reconsidered and shortened, as suggested by the Australian Government.

76. Article 8 did not give rise to any major problems, and he was not sure that the revision of subparagraph (*c*) suggested by the Special Rapporteur (A/CN.4/415, para. 93) was necessary. The Special Rapporteur's reference to article 46 of the 1969 Vienna Convention on the Law of Treaties in response to the comment made by the Mexican Government was very appropriate.

77. He had no major difficulty with article 9, but the comment made by the Mexican Government with regard to paragraph 2 should be borne in mind. It was true that the mere appearance of a State before a jurisdictional organ in order to protect its nationals did not mean that it waived its immunity.

78. As to the proposed new paragraph 4 of article 10 (*ibid.*, para. 107), he said that, once a State had submitted to jurisdiction, it should not be able to rule out the option of judicial settlement on the grounds indicated in that provision.

79. With regard to the proposed new article 11 *bis*, Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (para. 1 above) had proposed texts that deserved full attention, for they seemed to spell out more clearly what segregated State property consisted of.

80. Mr. McCAFFREY said that, before dealing with the draft articles one by one, he would refer generally to the approach to be followed for the second reading and to the general comments made by the Special Rapporteur in his second report (A/CN.4/422 and Add.1, paras. 2-19).

81. The Commission was embarking on the second reading in the midst of what both the previous and present Special Rapporteurs and most commentators had recognized as a trend towards limiting the circumstances in which a State could invoke immunity from jurisdiction. As Mr. Barsegov had demonstrated, moreover, some countries were in the process of thoroughly restructuring and decentralizing their economies and of strengthening the ties with their partners in the world market. Some States that had traditionally adhered to the absolute theory of jursidictional immunities were in the process of reconsidering their positions. Thus, in the past several years, there had been a number of almost revolutionary developments which had the potential to transform radically the practice of States in respect of jurisdictional immunities, although that would not happen overnight.

82. For those reasons, the Commission's approach to the second reading of the draft articles should be guided by two considerations. The first was that it should approach its task more deliberately and patiently than it normally did on second reading: there was no reason to rush and the task was far from finished. The second consideration was that the law in the area under examination was in a state of flux and would probably continue to evolve even after work on the draft articles had been completed: the United States of America, for example, had just enacted amendments to its *Foreign Sovereign Immunities Act of 1976*. The draft must therefore leave some room for further development of the law on jurisdictional immunities. Those considerations had led him to conclude that the Commission should not be in too much of a hurry and should concentrate for the time being on articles 1 to 11 *bis*, leaving the balance of the draft for discussion at its next session.

83. Still with regard to the consideration of the draft articles on second reading, the Special Rapporteur was right to say that the Commission must endeavour to prepare a new multilateral agreement which would make it possible "to reconcile conflicting sovereign interests arising out of the application or non-application of State immunity" (*ibid.*, para. 3). That was, after all, the main reason why the General Assembly had asked the Commission to take up work on the topic. Differences in economic systems and the increase in State trading since the end of the Second World War had given rise to disputes with regard to the circumstances under which a State and the organs through which it acted were immune from the jurisdiction of the courts of another State. While those disputes frequently arose as between States with planned economies—usually the defendants—and those with free-market economies—whose citizens were usually the plaintiffs—they also affected the developing countries, since much of their trading was carried out through State organizations or enterprises. It was thus in no one's interest to adopt an extreme approach: either it would discourage private enterprises from dealing with State entities or States would become reluctant to expose themselves to litigation in other countries. Instead, it was necessary to try to achieve the reconciliation to which the Special Rapporteur had referred.

84. He did not wish to enter into the debate on the current status of international law in the matter: he would, rather, say only that it was incontestable that a growing number of States had, either through legislation or through decisional law, permitted suits in their courts against foreign States in certain circumstances. While, as Mr. Mahiou (2116th meeting) had pointed out, it was not correct to say that defendant States had not contested such assertions of judicial jurisdiction, it must also be acknowledged that the practice of States adhering to the restricted immunities approach had been constant and uniform for some time; it could therefore not be asserted that there was universal recognition or observance of a monolithic rule on State jurisdictional immunities. When those same States were among the world's principal suppliers of capital, goods and services, the significance of their practice, and the tremendous importance of the Commission's task, came even more sharply into focus.

85. Turning to the draft articles themselves, he said that the Special Rapporteur was right to propose combining articles 2 and 3, but the new combined article 2 (A/CN.4/415, para. 29) called for some comments. The expression "sovereign authority", while not entirely satisfactory, was

intended to convey the meaning of the French expression *puissance publique*. The idea expressed by the term "governmental", which could be useful in the context of State responsibility, was ambiguous in the context of jurisdictional immunities: it could be argued that even State commercial activities (*acta jure gestionis*) were "governmental" activities, to the extent that they were done by the Government, even though the same acts could be done by private persons. As to whether "agencies or instrumentalities" of the State should be included in the definition of the "State", it could be argued that, if they were not included, the exceptions that applied to the State would not apply to them: that question merited careful consideration by the Commission.

86. The definition of a "commercial contract" in paragraph 1 (*c*) of the new article 2 was too limitative: it did not accurately reflect State practice and might be misleading. It would be better to refer to "commercial activity". If the first expression was retained, however, it must be defined broadly, as in paragraph 1 (*c*) (iii).

87. With regard to the determination of the nature of a contract, he could agree with the Special Rapporteur that paragraph 2 of article 3 as adopted on first reading lacked objectivity and made the exception it was intended to provide for meaningless. The Special Rapporteur's proposed revision in paragraph 3 of the new article 2 was preferable, but there was still room for improvement. For the sake of consistency, the expression "commercial contract" should be used instead of "contract for the sale or purchase of goods or the supply of services". The word "should" was to be avoided in a legal instrument, especially if the provision incorporating it was to be included in an article on the definition of terms.

88. There was, however, another, more fundamental point: even if a treaty or a contract contained a provision stipulating that the contract in question was for public governmental purposes, that might not be explicit enough for a private party to the contract. In the United States, for example, the *Foreign Sovereign Immunities Act of 1976* did not make the purpose of a contract a relevant criterion: the court could look only to the nature of the activity. The same was true in the practice of a number of States. The best way of handling the problem would be to leave it to the parties to stipulate, under article 11, paragraph 2 (*b*), that any dispute arising out of the transaction would not be subject to judicial jurisdiction: that would leave no doubt whatsoever in the minds of the parties.

89. Article 4 raised the question of the relationship between the draft articles and the 1961 Vienna Convention on Diplomatic Relations. That was an interesting problem, but not something with which the Commission should concern itself unduly. It had been said that the draft articles would lead to an anomalous situation, since a diplomat would be immune under the 1961 Vienna Convention for the very same acts that would subject the State he represented to jurisdiction. The situation might, however, not be as anomalous as was claimed. It was understandable that a diplomat should be accorded greater protection than a State, for the simple reason that having to defend a lawsuit would seriously hamper him in the performance of his functions; there was also the possibility that he would be exposed to pressure through litigation. Finally, it should not be forgotten that article 31, paragraph 1, of the 1961 Vienna Convention came very close to codifying some of the exceptions contained in the draft articles under consideration. He could therefore endorse the amended text of article 4, paragraph 1, proposed by the Special Rapporteur (*ibid.*, para. 50).

90. The words in square brackets in article 6, "and the relevant rules of general international law", should be retained in order to leave room for the continuation of the current trend. It would be difficult to locate that phrase anywhere else in the draft. The Special Rapporteur was also proposing a new article 6 *bis* (A/CN.4/422 and Add.1, para. 17), which did not, unfortunately, seem likely to accomplish the intended purpose. If, for example, State A filed a declaration adding an exception to those listed in the draft, but its declaration was nullified by the fact that State B "raised objection within thirty days", the result would be that State A, knowing what the probable outcome would be, would simply not become a party to the future convention. Article 6 *bis* was therefore not a positive addition to the draft.

91. The title of part III of the draft ([Limitations on] [Exceptions to] State immunity) raised a difficult point, since those in favour of the restrictive theory wanted to leave room for the practice of some States which went beyond the exceptions provided for in the draft articles. He wondered whether the Commission might use wording such as: "Cases in which State immunity may not be invoked before a court of another State".

92. He had a strong preference for the proposed new text of article 11, paragraph 1 (A/CN.4/415, para. 121), especially the words "the State cannot invoke immunity from that jurisdiction". The theory of "implied consent" could circumvent the intention of the article, as had been pointed out by a number of Governments. As he had already indicated, it would be better to refer to "commercial activities" than to a "commercial contract".

93. The proposed new article 11 *bis*, (*ibid.*, para. 122), which related to the situation of State enterprises having their own property, could very easily leave a private party to a contract without a remedy. In the event of default, a private party could bring suit only against the State enterprise, not against the State itself; in effect, its recovery would therefore be limited by the amount of property owned by the enterprise. That would mean that private parties contemplating entering into a commercial transaction with a State enterprise must check to see whether it had sufficient assets to cover its obligations: that would often be difficult, if not impossible. It could also happen that a State created State enterprises to minimize losses to the State itself—just as a corporation might create a subsidiary—but did not endow them with sufficient assets to cover their operations or obligations. In such cases, a court could allow creditors of a subsidiary to bring suit against the parent corporation, but that remedy would not be possible against a State. That was a trap for private parties and one that the draft should avoid.

94. There were other problems with article 11 *bis*, especially with regard to the words "on behalf of a State". A State could conduct trade through its enterprises, but, legally speaking, did such enterprises enter into obligations "on behalf of the State"? If so, the State would remain responsible, whether or not the enterprises had segregated State property. In that connection, Mr. Barsegov had

proposed a text (para. 1 above) that would deserve careful consideration if the Commission decided that the draft should include a separate provision on segregated State property.

95. In conclusion, he drew attention to the amendments to the *Foreign Sovereign Immunities Act of 1976* enacted in the United States in November 1988. One set of amendments dealt with the attachment of foreign State vessels in commercial service; and another set, on arbitration, liberalized the provisions of the Act relating to the enforcement of arbitral awards.

The meeting rose at 1.05 p.m.

2118th MEETING

Wednesday, 14 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/422 and Add.1,[3] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[4] ON SECOND READING (*continued*)

1. Mr. KOROMA, expressing appreciation to the Special Rapporteur for his lucid and comprehensive second report (A/CN.4/422 and Add.1), said that the practical significance of the topic of jurisdictional immunities of States and their property could not be overstated, since its effects were experienced almost every day. Over the years, the frontiers of the topic had expanded from the dichotomy between acts *jure imperii* and acts *jure gestionis* to encompass other spheres such as contracts of employment, personal injuries, damage to property, patents, trade marks, intellectual and industrial property, and fiscal matters. While such expansion was no bad thing, the danger was that it could increase the possibility of States being harassed by exposure to foreign jurisdiction. In that connection, he would draw members' attention to a case recently decided in the United States courts, *Colonial Bank* v. *Compagnie générale maritime et financière* (1986). Care must therefore be taken not to defeat the purpose of the basic rule that States must not be subject to foreign jurisdiction.

2. As pointed out by Governments in their comments and observations on the draft articles, the goal of the future convention was to reaffirm and strengthen the concept of jurisdictional immunities of States, while laying down clear exceptions. From that standpoint, to replace the principle of State immunity by functional, or restricted, immunity would not only weaken the effectiveness of the basic rule, but also lead to legal uncertainty and, in certain particulars, even hamper the efforts of some countries to achieve economic development. The Commission should therefore adopt the approach advocated by Brownlie as referred to by the Special Rapporteur in his report (*ibid.*, para. 13 *in fine*).

3. The tendency to divide the activities of Governments into acts *jure imperii* and acts *jure gestionis* was not always valid. For instance, although the purchase of pharmaceutical products could be regarded as a commercial transaction, for some countries having to make such a purchase it was not just an ordinary commercial transaction, since the health and well-being of their populations were involved. Nor would he support the theory of so-called "absolute" immunity. Indeed, he refrained from using the word "absolute", there being no such thing, in his view, as absolute immunity. The basic rule was simple, namely that one State was immune from the jurisdiction of another. If the Commission could confine itself to that simple rule, it would perhaps reduce the difficulties caused by having to choose between two schools of thought. On the other hand, there was no doubt that the topic had regrettably, but understandably, been subjected to various forms of pressure, for commercial reasons. It was the Commission's duty to relieve the topic of that pressure. One way of doing so was to formulate a rule on jurisdictional immunity on a consensual basis that would meet the interests of the international community. For that, an extensive analysis of the relevant legal material was required. In that connection, he noted that one learned author who was an advocate of the restricted immunity school had concluded that the absolute immunity theory certainly could not be said to have been discarded in favour of restricted sovereign immunity.

4. It was apparent that only a few States had submitted comments on the draft articles. The views of many more would therefore have to be canvassed if the interests and decisions not reflected in the report were to be taken into account. In view of the pressure he had mentioned, it was not possible to regard decided cases in national courts or even national legislation as sources for the topic. One means of taking the views of States into account, however, would be to make reference to their pleadings before a foreign court.

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

[2] *Ibid.*

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

[4] For the texts, see 2114th meeting, para. 31.

5. He agreed with the provision laid down in article 1, on the scope of the articles, but it should be followed immediately by the general principle of State immunity in order to facilitate understanding of the topic. Indeed, as some Governments had suggested, it might be possible to combine the definition of terms and interpretative provisions in article 1, which could then be followed by articles 2 and 3 dealing, respectively, with the scope of the draft and with the rule of immunity itself.

6. It would be more logical to combine the provisions of article 2, on the use of terms, and of article 3, containing the interpretative provisions, under one rubric. It was illogical, however, to include in a definition itself the very word that was being defined, as was done in paragraph 1 (*b*) (i) of article 2 with respect to the expression "commercial contract". The provision was not clear and would require examination in the Drafting Committee.

7. Paragraph 2 of article 3 provided for a dual test in determining whether a contract for the sale or purchase of goods or the supply of services was commercial. It was a finely balanced provision and should be retained, as it reflected State practice and represented a compromise between those who advocated that the nature of the contract should be the sole criterion and those who considered that the purpose should also be taken into account.

8. The definition of the term "State" in paragraph 1 of article 3 was acceptable, but would it not suffice to confine the definition to the State *per se*, saying simply that a State was the body entitled to exercise sovereign authority? In his view, that would be preferable to breaking down the definition into categories of agencies and instrumentalities. To determine whether a particular ministry or department, for instance, was an instrument of the State, it would be necessary to inquire into the constitutional arrangements of that State.

9. He supported the proposal by the German Democratic Republic (A/CN.4/410 and Add.1-5) for the inclusion of a new paragraph 2 in article 3. The express exclusion from the scope of the draft articles of legal entities not entitled to perform acts in the exercise of sovereign authority was a decisive criterion in determining whether an act *jure imperii* or an act *jure gestionis* was involved.

10. He welcomed the proposal by the Federal Republic of Germany that a clause be inserted in article 4, paragraph 2, to make it clear that types of immunity other than the jurisdictional immunity of the State remained unaffected. Equally welcome was the proposal by Spain and by the United Kingdom that the privileges in question should apply not only to heads of State, but also to heads of Government, ministers for foreign affairs and persons of high rank. On the other hand, the view that the privileges and immunities of heads of State and foreign ministers were based on international comity was untenable, for reasons he would not enter into at present but which perhaps constituted the rationale behind the Australian suggestion to include the words "under international law" in paragraph 1.

11. Article 6, which was central to the whole draft, should affirm the principle that a foreign State enjoyed immunity from the jurisdiction of the courts of a forum State and then spell out the exceptions to that principle clearly so that anyone who referred to the future convention would immediately know what was and was not immune from jurisdiction. Such a provision would reaffirm the equality of all States, enable foreign Governments to perform certain functions in the interests of the State without the hindrance of having to defend themselves before foreign courts, and also accommodate the interests and legal rights of all those engaged in business with foreign Governments. To avoid any ambiguity, however, the words in square brackets, "and the relevant rules of general international law", should be deleted. Retaining them would make the efforts to elaborate a set of precise rules on State immunity nugatory by giving the impression that the draft was not comprehensive. It might also suggest that the theory of absolute immunity still applied and he doubted whether the Commission wished to adopt such a rigid position. The proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17) would also perpetuate that ambiguity, since it would enable States to pick and choose so far as the rule of immunity was concerned. It was therefore important to set out the rule and the exceptions unequivocally, and not to leave the matter to States.

12. He was a little uneasy about the title of article 7, which did not correspond to its content, for paragraph 1 dealt with how effect was to be given to State immunity, while paragraphs 2 and 3 were concerned with the meaning of the expression "a proceeding before a court of a State". If the title were retained, he would suggest that the word "modalities" be replaced by "modes", which meant methods and procedures. Paragraphs 2 and 3 should perhaps be incorporated under the consolidated provisions of articles 2 and 3, but, if they were kept in article 7, he agreed with Australia's comments that they should be formulated in different terms.

13. He endorsed the proposal that a provision be introduced in article 8 whereby a State that had consented to the exercise of jurisdiction by a foreign court would be granted immunity in cases where a fundamental change in circumstances had occurred. Under domestic law, when ships were unable to deliver consignments because of *force majeure* or a fundamental change in circumstances, the contract was normally frustrated. The inclusion of such a proviso in the draft articles would not be to harm their terms, and would simply reflect reality.

14. The controversy which had surrounded the title of part III of the draft was regrettable and was apparently due to the dichotomy between the absolute and restrictive theories of immunity. It was normal to speak of an exception to a rule, however, and in the case of jurisdictional immunities the Commission was required by its mandate to elaborate a rule and spell out the exceptions to it. Accordingly, part III should set forth those exceptions, possibly with an explanation in the commentary that that did not imply the codification of one school of thought or the other.

15. With regard to article 11, it had been said that, where a dispute arose regarding a commercial contract, a State could not invoke immunity from jurisdiction in proceedings arising out of that contract. But in the disputes that had actually come before the courts—for example, *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* (1977), *The "I Congreso del Partido"* (1981), *Verlinden B.V.* v. *Central Bank of Nigeria* (1981) and *Colonial Bank* v. *Compagnie générale maritime et financière* (1986)—the issues had been much more complex than a simple dichotomy between commercial and non-commercial contracts.

A contract that at first glance appeared to be commercial might not involve the profit motive which was normally associated with a commercial contract. States should be able to invoke immunity if a transaction was carried out in the exercise of sovereign authority.

16. Concerning paragraph 1 of article 11, even if jurisdiction was assumed, it should be made contingent on a territorial link between the commercial contract, the parties thereto and the State of jurisdiction, in order to prevent "forum shopping" or undue extension of domestic legislation. The decision by the United States District Court in the *Colonial Bank* case had been to that very effect, and similar provisions should be incorporated in article 11.

17. He agreed with other members that the Commission should take sufficient time to consider the articles thoroughly and not hasten to refer them all to the Drafting Committee. The areas covered by the articles following on from article 11, such as employment, patents and intellectual property, represented new frontiers requiring closer examination. The Commission should terminate its discussion with article 11, refer the first 11 articles to the Drafting Committee and take up the remaining articles at its next session.

18. Mr. DÍAZ GONZÁLEZ said that the Special Rapporteur's reports contained a wealth of information, an achievement that was not surprising from someone as intimately acquainted with the material as he was. The purpose was to analyse the comments received from what was, unfortunately, only a small number of States and, on the basis of those comments, propose amendments to or new versions of the articles for consideration on second reading. Most of the proposed changes related to wording alone and should be studied by the Drafting Committee. Some of the points raised, however, struck at the heart of the problem and deserved due consideration by the Commission.

19. In keeping with the Chairman's recommendation, he would limit his comments to articles 1 to 11. Mr. McCaffrey (2117th meeting) was right in saying that the Commission should not be precipitate and that it would be better to leave the consideration of the other articles until the next session. By that time, additional comments might have been received from States.

20. The set of articles was a compromise text arrived at after lengthy debate and should be viewed in that light as the second reading commenced. It could not be inferred that one approach had prevailed over another. Nearly half of the few States that had submitted comments were European countries, but even they were not unanimous in agreeing that the 1972 European Convention on State Immunity was relevant to the Commission's exercise. There was a wide divergence of opinion about the criteria that should be used for the principle of immunity. The opinions of most African, Asian and Latin-American countries were not available, and it was impossible to draw definitive conclusions from the comments made by States.

21. He could endorse the current formulation of article 1, but believed that the principle of immunity should be enunciated exactly as it was now set out in article 6. Articles 2 and 3, dealing with the use of terms and interpretative provisions, respectively, should indeed be combined into a single article on terms and definitions.

22. Similarly, he could endorse the amended text of paragraph 1 of article 4 proposed by the Special Rapporteur (A/CN.4/415, para. 50), but he would agree with Mr. Thiam (2117th meeting) that the article's implications should be considered in the light of, in particular, article 31 of the 1961 Vienna Convention on Diplomatic Relations. Mr. Reuter (2115th meeting), citing a text submitted by the previous Special Rapporteur, had made a number of very pertinent observations concerning the danger of giving more immunities to diplomats than to States. The cases that had been raised relating to the rights and interests of a State having territorial jurisdiction and to the immunities of third States, especially when offences such as assassination or espionage were committed by their diplomats, were all covered by rules governing the rights of diplomats, such as those laid down by the ICJ in its judgment in the case concerning *United States Diplomatic and Consular Staff in Tehran*.[5]

23. The Special Rapporteur had rightly pointed out that it might be premature to comment on article 5: the Commission would see whether or not it should be retained later, on completion of the second reading.

24. Article 6 was the keystone of the entire draft, and it represented a balanced compromise among a number of schools of thought. The bracketed phrase should be deleted: as Mr. Bennouna (2117th meeting) had remarked, it was illogical to take away with one hand what had been given with the other. The argument—based on the example of the 1972 European Convention—that State practice was still being developed did not hold water, as Mr. Mahiou (2116th meeting) had pointed out.

25. It was the opinion of many countries that State immunity was a basic principle of international law stemming from State sovereignty. The purpose of the draft articles was to consolidate present practice in an attempt to regulate the conditions in which State immunity was invoked. Exceptions had to be provided for, but a set of limitative exceptions that would end up by doing away with the principle of immunity should not be imposed. In a draft designed to unify existing norms and practice, the introduction of uncertainty that might give rise to more divergences than already existed and create more problems than solutions should be avoided.

26. He supported the proposals concerning articles 7, 8 and 9 made by the Special Rapporteur in his preliminary report (A/CN.4/415). As to the title of part III of the draft, the words "exceptions to" were preferable to "limitations on" and seemed to be the more accurate.

27. The texts proposed by Mr. Barsegov (2117th meeting, para. 1) and Mr. Shi (2115th meeting, para. 24) for the new article 11 *bis* both contained elements that merited consideration and might help to improve the wording. He reserved the right to make additional comments when those proposals became available in Spanish.

28. In conclusion, he wished once again to thank the Special Rapporteur for his excellent reports, his synthesis of the comments made by States and his efforts to arrive at compromise solutions.

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[5] Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3.

29. Mr. SOLARI TUDELA said that he concurred with members who had commended the Special Rapporteur's reports, which were valuable for their doctrinal components and pragmatic in their approach to compromise. They employed a methodology which guided the reader among the various positions in the international community. As he had not been a member of the Commission during the consideration of the draft articles on first reading, he would make fairly general comments and would not linger over the debate on the absolute and restrictive theories of State immunity. His own view was that immunity must be absolute, in line with the principle of the sovereign equality of States set out in the Charter of the United Nations, but that did not mean that exceptions should not be made in very specific cases.

30. Everyone must be aware that draft articles setting the scope of immunity and circumscribing the exceptions thereto would make an important contribution to international trade and finance: such were the inevitable and fruitful consequences of the establishment of legal security.

31. He endorsed the wording of article 1 and saw no significant reason why articles 2 and 3 should not be combined in a single article. As to substance, the term "State" was defined as comprising "agencies or instrumentalities of the State": hence a close correlation should be maintained with article 11 and the proposed new article 11 *bis*, on commercial contracts and segregated State property, respectively. If a State-owned enterprise which, under the terms of the new combined article 2 (A/CN.4/415, para. 29), was considered a State did not have immunity from jurisdiction in its commercial activities, its property should not be held as security for actions taken against the State. The text of paragraph 3 proposed by the Special Rapporteur for determining the commercial character of a contract was the best solution. Such a determination should be based on the contract's nature and also take account of its purpose.

32. It was appropriate that article 4, paragraph 2, should mention the immunity of heads of State, but the reference should be extended to encompass heads of Government, ministers for foreign affairs and high-ranking officials. Of course, the draft articles dealt with State immunity, not personal immunity, but it was merely a question of setting out in a legal instrument the rights already recognized under customary law. The 1969 Convention on Special Missions did not suffice in that context, for it referred to immunities granted in very specific circumstances. The immunities should be acknowledged to apply to all situations—private visits, transit, unofficial meetings, etc.—and the draft afforded an excellent opportunity in that regard. The courts of the United Kingdom offered valuable and classic legal precedents, for in that country immunities were not simply an expression of courtesy, as the Special Rapporteur argued in his preliminary report (*ibid.*, para. 49), but were actually the manifestation of a right.

33. Article 6 would be acceptable if the bracketed phrase were deleted in order to give the entire set of draft articles a more precise scope, in terms both of the notion of immunity and of the permissible exceptions. The bracketed phrase, if retained, would introduce an element of ambiguity that would vitiate the entire article.

34. The new wording proposed by the Special Rapporteur for article 7 (*ibid.*, para. 79) in conformity with the suggestion made by the Government of Australia was more appropriate.

35. Again, the proposed new text of article 8 (*c*) (*ibid.*, para. 93) was a considerable improvement. He did not, however, agree with the comment made by the Government of Switzerland and endorsed by the Special Rapporteur that fundamental changes in circumstances should not be relevant to claims of immunity. If that approach were adopted, it would introduce a new limitation on invoking those grounds for termination of an international agreement, including agreements which provided that a State must submit to the jurisdiction of a foreign court in disputes arising from the application of a commercial contract. The cases in which such grounds could not be invoked were clearly set out in the 1969 Vienna Convention on the Law of Treaties, and it would not appear that agreements of the kind dealt with in article 8 of the draft were among them.

36. Lastly, he could agree to the amended texts of articles 9, 10 and 11 proposed by the Special Rapporteur in his preliminary report (A/CN.4/415) and considered that the texts proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (2117th meeting, para. 1) offered extremely valid contributions to the formulation of article 11 *bis*.

37. Mr. PAWLAK said that, as a relative newcomer to the Commission, he was somewhat reluctant to revert to issues which had already been discussed at length during the first reading of the draft articles. Nevertheless, he felt it his duty to comment on fundamental aspects of the topic and make suggestions about the way in which the Commission should conduct its work during the second reading.

38. First, he could not agree with the view expressed by the Special Rapporteur in his second report (A/CN.4/422 and Add.1, para. 10) that the theory of absolute State immunity in State practice was no longer a universally binding norm of customary international law. The Commission's discussion, as well as the comments received from Governments, proved the contrary. While it could not be denied that the number of States opposed to the absolute theory had continued to grow in recent years, especially among highly developed Western countries increasingly engaged in foreign trade, a very large number of States still relied on the absolute theory and applied it in practice. It was not the Commission's role to decide which of those conflicting views should prevail but, rather, to elaborate and submit to the General Assembly a draft which could serve as a useful legal instrument for the development of economic ties among all nations.

39. The draft articles adopted on first reading in 1986 did not adequately take into account the practice of the socialist States and of many developing countries. The balance proposed in the draft was far from satisfactory to them. If the Commission really wished to reach a compromise on the complex and highly sensitive issue under consideration, it should examine not only trends in Western practice, but also activities in other parts of the world. Without wishing to repeat the arguments advanced already by Mr. Shi, Mr. Barsegov, Mr. Koroma and Mr. Mahiou,

he would point out that, at a time when States were increasingly engaged in economic and financial activities, it was very difficult to draw a precise borderline between the public and commercial operations of State organs. The balance between the interests of foreign States and those of the State in whose territory the question of immunity arose should be based not on the anachronistic division between *acta jure imperii* and *acta jure gestionis* but on more modern criteria which more adequately reflected the needs and practices of the present day and did not run counter to the principle of the sovereign equality of States.

40. In Poland, as in many other socialist and developing States, enterprises owned by the State had legal personality and possessed assets which they had received from the State and which they could use without involving State liability and without being liable to the State. As evidenced by the *Czarnikow* v. *Rolimpex* case heard in the United Kingdom courts a few years earlier, Polish State enterprises conducted their commercial activities at their own risk and on their own account and did not claim immunity from jurisdiction in court actions brought against them. In practice, only credit agreements concluded by the Polish Ministry of Finance with foreign commercial banks could be considered "commercial contracts" within the meaning of article 2 of the draft. Actually, under Poland's revised economic laws the privileged status of State enterprises had now been replaced by a truly equal status for all economic entities, including private companies.

41. He would urge the Commission not to hurry in its work but to adopt a more patient approach, taking into consideration all aspects of the rapid changes in State practice and regulations. In that context, he welcomed the position adopted by the Special Rapporteur, which was more realistic and pragmatic than that of his predecessor. While remaining a firm advocate of the view that absolute immunity was a norm of general international law, he was also in favour of reconciling conflicting interests and was willing to determine on a case-by-case basis what types of activities should or should not enjoy sovereign immunity.

42. Turning to the draft articles themselves, he said that article 1 was acceptable and he agreed with the Special Rapporteur that the enunciation of the general principle should be left in article 6.

43. Articles 2 and 3 should be merged and rearranged in accordance with the proposals of a number of States and of the Special Rapporteur himself. Paragraph 1 (*b*) (iii) and (iv) of the new combined article 2 (A/CN.4/415, para. 29) should clearly define the State representatives and agencies mentioned; moreover, the expression "instrumentalities of the State" was too vague, and the explanation given in the commentary was not sufficient. The definition of the expression "commercial contract" should, as Mr. Reuter (2115th meeting) had pointed out, make it clear that transactions by States for public purposes were not included.

44. He supported the proposal made by the German Democratic Republic in connection with article 3 for the addition of a further paragraph on the meaning of the term "State". He also believed that, in determining the commercial character of a contract, the nature of the contract should be the basic criterion and its purpose an additional criterion.

45. As to article 4, he endorsed the Special Rapporteur's proposal, further to a suggestion by Australia, to add the words "under international law" in paragraph 1. As Mr. Tomuschat (2116th meeting) and other members had suggested, it would be appropriate to include a reference to heads of Government and ministers for foreign affairs in paragraph 2. It had been maintained that the article was superfluous, but he believed it important to clarify the position of diplomats and leading personalities *vis-à-vis* the State immunities envisaged in the draft.

46. Article 6 was and should remain a crucial provision of part II of the draft. The phrase appearing in square brackets should be deleted, otherwise it would destroy the purpose of the article. He could not accept the alternative wording proposed by Australia or the Special Rapporteur's suggestion that deletion of the bracketed phrase could be offset by the possible addition of article 28. Clearly, there was no need for the proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17).

47. Article 7, as redrafted by the Special Rapporteur (A/CN.4/415, para. 79), posed no difficulty, especially with the adoption of Australia's drafting suggestion concerning the expressions "forum State" and "foreign State". However, he deprecated the use of terms such as "interests" and "control" and would prefer them to be deleted or replaced.

48. He saw no need to modify article 8 (*c*), as suggested by Australia. As for article 9, he shared Mr. Barsegov's view that the proposed new paragraph 3 unduly complicated the situation and should not be included.

49. With regard to the title of part III of the draft, the wording "Exceptions to State immunity" was the more appropriate, as suggested by many Governments. He supported the view expressed by some members of the Commission that exceptions should be kept to a very strictly defined minimum.

50. Article 11, with the changes in paragraph 1 proposed by the Special Rapporteur (*ibid.*, para. 121), reflected the character of commercial contracts more clearly than did the previous text. However, he shared the concern that the concept of State-owned enterprises with segregated property in socialist States should be reflected somewhere in the draft articles. The new article 11 *bis* proposed by the Special Rapporteur (*ibid.*, para. 122) was a very commendable effort, but it required further consideration as well as conceptual and drafting changes. The texts proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (2117th meeting, para. 1) were very helpful, yet they, too, required further study; for his part, he wished to compare those proposals with the new economic laws enacted in his country and to make further comments, time permitting, at a later stage.

51. Generally speaking, articles 12, 13 and 16 unnecessarily expanded the number of exceptions to State immunity. Such articles might have some justification in bilateral agreements but were out of place in a universal convention. They should therefore be deleted on second reading. Employment disputes (art. 12) were normally regulated by the domestic law of the foreign State. The cases covered by article 13 related in the main to traffic accidents and, as such, were covered by insurance. Art-

icle 16, on fiscal matters, was in its present wording contrary to the principle of the sovereign equality of States and therefore unacceptable.

52. He supported the Special Rapporteur's suggestion that subparagraphs (*b*) to (*e*) of paragraph 1 of article 14 could be deleted, and would add that some further changes might be made in the Drafting Committee. He did not, for the present, have a very clear position as regards retaining or deleting article 15: the arguments advanced by some developing countries were convincing, but the Special Rapporteur's reasoning in his second report (A/CN.4/422 and Add.1, para. 23) also had to be taken into account.

53. The term "non-governmental" appearing in square brackets in paragraphs 1 and 4 of article 18 should be deleted, but even then the article would raise difficulties for States with State enterprises. Likewise, article 19 was difficult to accept, even with the changes proposed by the Special Rapporteur. In that connection, he agreed with the suggestions made by Mr. Shi and also with the view expressed by the Government of Yugoslavia.

54. Lastly, for the reasons given by the German Democratic Republic, Mexico and the Soviet Union, he considered that article 20 was unnecessary and should be deleted.

55. Mr. ROUCOUNAS, referring to paragraph 2 of article 3, said that the guidance it gave to judges was certainly useful from the point of view of protecting the parties, which, after all, was the main purpose of the draft as a whole. However, judges should remain free to determine in each particular case whether the purpose, as well as the nature, of the contract should be taken into account. Further discussion on that point in the Commission would be welcome. Since the interpretative provision in paragraph 1 of the article spoke of political subdivisions of the State entitled to perform acts in the exercise of the State's sovereign authority, it was appropriate that reference should also be made to representatives of the State.

56. He agreed with Mr. Thiam (2117th meeting) that paragraph 1 of article 4 dealt with two different categories of immunity, but it was important to retain both subparagraph (*a*) and subparagraph (*b*). In that connection, the words "their members" would be better than "persons connected with them", in subparagraph (*b*). With regard to paragraph 2, reference should indeed be made not only to heads of State, but also to all persons mentioned in article 21 of the 1969 Convention on Special Missions. The special protection provided for heads of State in the past reflected the fact that virtually all duties pertaining to foreign affairs used to be vested in the head of State. In view of the developments which had taken place over the years, it was appropriate for the provision to be extended so as to cover heads of Government and ministers for foreign affairs.

57. In the matter of the bracketed phrase "and the relevant rules of general international law", in article 6, he would point out that legal opinion was still divided on the question whether customary international law was invariably superseded by codified law. In his view, the draft should not attempt to cover all possible cases: the point was to find a form of words acceptable to all, possibly along the lines suggested by Mr. Reuter (2115th meeting, para. 46).

58. With regard to article 7, Mr. Shi (2115th meeting) had mentioned the high cost of court proceedings, which in some cases could jeopardize the fairness of a trial. His own view was that article 7 was essential for that very reason, since it would incite Governments to find means of making the provisions of the draft as a whole known and accessible to all interested State bodies.

59. While generally agreeing with the thinking behind article 8, he felt that subparagraph (*c*) was still rather too limitative; as other members had suggested, a reference to agreement given through the diplomatic channel might also be included. Again, he saw no need for the inclusion of a new paragraph 4 in article 10, as proposed by the Special Rapporteur (A/CN.4/415, para. 107).

60. With regard to the title of part III of the draft, he would favour a less controversial form of words, possibly along the lines suggested by Mr. McCaffrey (2117th meeting, para. 91), but another possible solution would be to use a completely new title, such as "Exercise of jurisdiction by the forum State".

61. Lastly, he agreed with the Special Rapporteur that the phrase "is considered to have consented . . . " should be deleted from paragraph 1 of article 11. With regard to the proposed new article 11 *bis*, he took the view that the texts proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (2117th meeting, para. 1), as well as by the Special Rapporteur himself (A/CN.4/415, para. 122), could guide the Commission towards a generally acceptable solution.

62. Mr. FRANCIS expressed appreciation to the Special Rapporteur for his excellent reports and said that, as indicated in the second report (A/CN.4/422 and Add.1, para. 3), the aim in the course of the second reading of the draft articles should be to elaborate a new multilateral agreement which reconciled conflicting sovereign interests arising out of the application or non-application of State immunity, rather than to set out a mere confirmation of the more fundamental principle of sovereignty in that area.

63. The Commission had before it a set of draft articles which had been adopted on first reading and to which the Special Rapporteur had proposed certain changes in order to take into account the comments made by Governments and by members. The various articles, however, appeared in different documents, making the presentation somewhat unwieldy, as already pointed out by other members during the present discussion. He would urge the Special Rapporteur to present, at the Commission's next session, the whole body of draft articles as proposed by him in a single composite document, for the purposes of more convenient consideration.

64. Another point made during the discussion was that the Commission had not had sufficient time to consider carefully a set of draft articles that was much too important to be rushed through a second reading. As noted by Mr. McCaffrey (2117th meeting), it was necessary to bear in mind the changes taking place in the international community which affected the law itself, law that was in fact in a state of flux. For example, a more liberal approach to the whole subject of arbitration was becoming apparent in the United States of America. For those reasons, a more careful and deliberate approach was needed to the consideration of the draft articles, and in that regard he wholeheartedly supported the suggestion that the Commission should concentrate at the present session on articles 1 to 11.

65. Turning to the articles themselves and referring to the criteria for determining what constituted a "commercial contract" set out in paragraph 2 of article 3, he recalled that, during the first reading, he had cited the example of the intervention of the Government of Jamaica in the late 1970s in purchasing basic foodstuffs abroad. The element of the purpose of commercial contracts was certainly one that should be retained.

66. It was right for article 4 to say that the present articles were without prejudice to the privileges and immunities enjoyed by a State under existing diplomatic agreements, but the relevant international conventions should be listed in the article. A reference to "diplomatic immunity", however, would not be appropriate in that it concerned the agents of the State, rather than the State itself. In the present instance, the analogy was with the immunity enjoyed by a diplomatic mission under the 1961 Vienna Convention on Diplomatic Relations rather than with the immunity enjoyed by individual diplomatic agents.

67. The Special Rapporteur seemed to be in favour of the proposal made by Spain (A/CN.4/410 and Add.1-5) to delete the bracketed phrase "and the relevant rules of general international law", in article 6, and to transfer the idea to a paragraph in the preamble to the future convention. Actually, the Spanish proposal would not solve the problem. The best course would be simply to delete the phrase in question, which could well give rise to divergent interpretations and possibly create some confusion. Another reason was that the phrase was unnecessary in article 6 because of the provisions of article 28, whereby States could agree to extend to each other treatment different from that required under the present articles. The States concerned thus had considerable latitude regarding liberalization of the draft articles. The proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17) was not acceptable, because it would weaken the content of the basic rule set out in article 6.

68. The interesting amendments proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (2117th meeting, para. 1) for the new draft article 11 *bis* contained elements which could enable the Commission to reach a compromise on a matter which had not yet been dealt with. It should be noted in that connection that the concept of segregated State property did not exist in many developing countries. In the case of an entity which had juridical status under municipal law and which contracted abroad, there was no excuse for the Government itself to be brought into litigation in the foreign country concerned. In the event of a judgment being given abroad against an arm of a sovereign State, it was for the Governments of the States concerned to settle the matter at the diplomatic level. A sovereign State itself could not be arraigned before a foreign court, a point that the Special Rapporteur should take into consideration.

69. Lastly, the term "exceptions" was preferable to "limitations" in the title of part III of the draft.

70. Mr. AL-BAHARNA congratulated the Special Rapporteur on his well-balanced preliminary report (A/CN.4/415), which was aimed primarily at bridging the gap between the so-called restrictive theory of State immunity and the already established doctrine of the absolute immunity of States. In view of recent practice, it could be said that absolute State immunity was no longer a norm of general international law. On the other hand, the restrictive theory could not be imposed unilaterally against States which believed in the doctrine of absolute immunity. Among the latter group of States, however, it was encouraging to note the recent practice of solving problems arising from "commercial contracts" by accepting the idea of a State enterprise, which was subject to the jurisdiction of foreign courts so far as segregated State property placed in its possession was concerned.

71. In considering the present topic, the Commission should as far as possible avoid discussion of theoretical questions and adopt the Special Rapporteur's pragmatic approach. For example, the Special Rapporteur wisely proposed that articles 2 and 3 should be combined in a single new article 2, on the use of terms. However, the expression "international instruments", in paragraph 2 of the combined article (*ibid.*, para. 29), should be replaced by "international agreements", which was not so wide in scope.

72. Members had been asked for their opinion as to whether the term "State" should also cover the constituents of a federal State. Indeed it should, for the definition contained in article 3 referred to the organs, political subdivisions, agencies and representatives of the State.

73. Another point concerned the definition of the expression "commercial contract". The question whether the test of a commercial contract should be its nature or its purpose was one which was debated in law and on which States naturally differed. The purpose test had been defended by the Special Rapporteur on the grounds that it could be helpful in determining the character of contracts for development aid and famine relief. The Special Rapporteur had proposed a new formulation in paragraph 3 of the new article 2: ". . . but if an international agreement between the States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose, that purpose should be taken into account in determining the non-commercial character of the contract." That amendment had the drawback of complicating the text by introducing the notion of an "international agreement" and stipulating the need for a specific statement that the contract was for a governmental purpose. It would be better to retain the text adopted on first reading (para. 2 of article 3), modified along the following lines:

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

That text would remove the qualifications imposed on the purpose test by the words "if, in the practice of that State, that purpose is relevant".

74. He supported the revised paragraph 1 of article 4 proposed by the Special Rapporteur pursuant to a comment by the Government of Australia and also endorsed his recommendation that, pending the final formulation of other draft articles, it was perhaps premature to contemplate any revision of article 5.

75. As to the much debated article 6, it was clear from the comments of Governments analysed in the preliminary report that it constituted the essential core of differences among States. For his part, he did not share the view that the retention of the bracketed phrase "and the relevant rules

of general international law" would necessarily lead foreign courts to seek exceptions to the immunity of States outside the framework of the draft articles. Nor, for that matter, would it encourage unilateral restrictions of the immunity of a State. Moreover, deletion of the phrase in question might interfere with the progressive development of norms of general international law. As a pragmatic compromise, therefore, he would be prepared to accept the suggestion by the Government of Spain, supported by the Special Rapporteur, to omit the phrase in question from the body of the text and transfer the underlying idea to the preamble to the future convention.

76. In introducing his second report (A/CN.4/422 and Add.1), however, the Special Rapporteur (2114th meeting) had invited members to comment on the choice between two alternatives, namely: (*a*) deleting the bracketed phrase and transferring it to the preamble, as suggested by Spain; and (*b*) deleting the phrase and introducing a new article 6 *bis* to provide an optional declaration with a view to maintaining an appropriate balance with the position of those States which favoured the restrictive theory of immunity. After careful examination of draft article 6 *bis*, he was not inclined to accept it. Introducing a new optional declaration into the draft convention did not seem an attractive idea and the article could well give rise to unnecessary procedural confusion.

77. He had no objection to the proposed new text of article 7 (A/CN.4/415, para. 79), which had been made clearer by the use of the expressions "forum State" and "foreign State", replacing the somewhat confusing expressions "a State" and "another State". The proposed reformulation of article 8 (*c*) was acceptable and he could support article 9 as it stood, but was not opposed to the addition to paragraph 1 and the insertion of the new paragraph 3 recommended by the Special Rapporteur (*ibid.*, para. 100). Article 10 was equally acceptable.

78. The question of the title of part III of the draft had given rise to some sharp differences of view in the Commission and in the Sixth Committee of the General Assembly. The Special Rapporteur had suggested that consideration of the title be deferred until concrete and individual issues had been settled. There was considerable merit in that approach, which demonstrated the Special Rapporteur's concern to go ahead with substantive questions without being bogged down by drafting issues.

79. He had no difficulty in accepting article 11, as slightly amended by the Special Rapporteur, and shared the view that the phrase "the State cannot invoke immunity . . ." was preferable to "the State is considered to have consented . . . ".

80. The proposed new article 11 *bis*, on segregated State property (*ibid.*, para. 122), seemed confusing. It was intended basically to accommodate a distinct legal régime on State immunities pertaining to so-called segregated State property of the socialist countries. Accordingly, he had mixed feelings as to whether the article should be included at all. Was it really necessary in a universal convention? Nevertheless, he had an open mind on the subject and would like the Commission to decide the matter.

81. In his oral introduction, the Special Rapporteur had suggested that article 11 *bis* would strike a balance between the restrictive theory and the absolute theory. Socialist countries, however, had "economic organizations" which were separated as juridical persons from the State and were individually responsible for their economic obligations solely within the limits and to the extent of the specific State property they possessed. Those economic organizations, therefore, within the limits assigned to them by the legislation of the socialist countries, would not enjoy immunity. On the other hand, under the law in the socialist countries, the State—which was distinct from the economic organizations in question—could still, in its sovereign capacity, enter into economic and trade relations and therefore claim immunity from the jurisdiction of foreign courts. That was precisely the question at issue, and not merely the issue of segregated State property. It was a problem that had to be dealt with separately and article 11 *bis* did not provide a solution.

The meeting rose at 1.05 p.m.

2119th MEETING

Thursday, 15 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/422 and Add.1,[3] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[4] ON SECOND READING (*continued*)

1. Mr. AL-BAHARNA, continuing the statement he had begun at the previous meeting, said, in reference to the new article 11 *bis* proposed by the Special Rapporteur (A/CN.4/415, para. 122), that, although economic organizations in socialist countries did not enjoy jurisdictional immunity,

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

[2] *Ibid.*

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

[4] For the texts, see 2114th meeting, para. 31.

the State itself could, in its sovereign capacity, enter into economic and trade relations and therefore claim immunity from the jurisdiction of foreign courts. Accordingly, the question was one not of segregated State property, but of the operations of State enterprises having legal personality, and the title of article 11 *bis* should be "State enterprises". In any event, that article did not provide a comprehensive solution.

2. Article 12 (Contracts of employment) was acceptable subject to the amendments suggested by the Special Rapporteur in his preliminary report (*ibid.*, para. 133).

3. Article 13 (Personal injuries and damage to property) was also acceptable, but again subject to the amendments suggested by the Special Rapporteur (*ibid.*, para. 143), which consisted of the deletion of the last phrase of the article and the addition of a new paragraph 2 excluding the rules concerning State responsibility under international law.

4. The Special Rapporteur pointed out, with regard to article 14 (*ibid.*, paras. 152-154), that paragraph 1 (*c*), (*d*) and (*e*) mainly concerned the legal practice in common-law countries and suggested that they either be deleted together with subparagraph (*b*) or be amended better to reflect practice. The first solution was preferable. A codification convention should, in so far as possible, be based on the general practice of States rather than on a particular legal system. Thus amended, the article would be acceptable.

5. Articles 15, 16 and 17 raised no problems and were acceptable.

6. The term "non-governmental" in paragraphs 1 and 4 of article 18 (State-owned or State-operated ships engaged in commercial service) should be deleted, in accordance with the Special Rapporteur's suggestion, since, as a number of Governments had pointed out, it was ambiguous and could give rise to controversy. The Special Rapporteur also recommended the addition of a paragraph 1 *bis* (A/CN.4/422 and Add.1, para. 26) whereby State enterprises and segregated State property could be dealt with separately. He reserved his position on that point, for the reasons he had stated in connection with article 11 *bis*.

7. He would have no difficulty with article 19 (Effect of an arbitration agreement) if it incorporated the amendments suggested by the Special Rapporteur, which consisted, first, of using the expression "commercial contract" rather than "civil or commercial matter" and, secondly, of adding a new subparagraph (*d*) on recognition of the award.

8. He also wished to reserve his position on article 20 (Cases of nationalization), whose meaning and scope required further clarification.

9. With regard to article 21 (State immunity from measures of constraint), the Special Rapporteur had rightly suggested the deletion of the words in square brackets and of the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" in subparagraph (*a*). He could not agree to the alternative to the deletion of the latter phrase suggested by the Special Rapporteur, namely the addition of the words "Unless otherwise agreed between the States concerned" at the beginning of the article.

10. The words in square brackets in article 22 (Consent to measures of constraint) should be deleted in accordance with the Special Rapporteur's recommendation, and as had been proposed in the case of article 21.

11. The Special Rapporteur proposed that article 23 (Specific categories of property) be amended slightly by deleting the term "non-governmental" in square brackets in paragraph 1 and adding the words "and serves monetary purposes" in paragraph 1 (*c*). He could support the article as thus amended.

12. Lastly, he appealed to the Commission to avoid the temptation of making radical changes to the texts adopted on first reading in 1986. The Commission should abide by its decision to adopt the draft articles on second reading before the end of the current session.

13. Mr. CALERO RODRIGUES said that he would confine his remarks on articles 12 *et seq.* to the amendments it was proposed to make to the texts adopted on first reading.

14. Article 12 stipulated, in paragraph 1, that a State could not invoke immunity before a court of another State with respect to contracts of employment if the employee had been recruited in that other State and, also, if he was covered by the social security provisions in force there. The Special Rapporteur proposed to delete the latter condition. It had been included, however, because the fact of being covered by the social security system of a State was further evidence that the contract came under the legal system of that State. The argument in favour of the amendment, namely that the condition would lead to discrimination as between countries which had social security systems and those which did not, was not very convincing.

15. Paragraph 2 of the article listed a number of exceptions, the first two of which, in subparagraphs (*a*) and (*b*), the Special Rapporteur proposed to delete. For his own part, he would have difficulty in accepting the deletion of subparagraph (*a*) ("if . . . the employee has been recruited to perform services associated with the exercise of governmental authority"), since it covered precisely the type of case in which the employee should not come under the jurisdiction of another State. In that connection, he noted that, in the English version of the draft, the French expression *puissance publique* was translated in various ways. He was also unable to agree to the deletion of subparagraph (*b*) ("if . . . the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual"), since it was difficult to see how a State could be forced by the court of another State to keep a particular person in its employment.

16. He had difficulty in accepting the Special Rapporteur's suggestion that the words "and if the author of the act or omission was present in that territory at the time of the act or omission", at the end of article 13 (Personal injuries and damage to property), should be deleted. That would enlarge the scope of the exception laid down by the article, which might be too wide already. It should also not be forgotten that transboundary harm would come under the article. Moreover, on the basis of a suggestion by the Government of Spain (A/CN.4/410 and Add.1-5), the Special Rapporteur proposed the addition of a paragraph 2

concerning the rules of State responsibility. He doubted, however, whether the solution to the question of personal injuries and damage to property should be left to those rules, and the Special Rapporteur himself did not seem to be persuaded that it should.

17. While he welcomed paragraph 1 (*a*) of article 14 (Ownership, possession and use of property), since immovable property situated in the territory of a State fell, naturally as it were, under its jurisdiction, subparagraphs (*b*) to (*e*), which dealt with both movable and immovable property, complicated the situation. As subparagraphs (*c*), (*d*) and (*e*) used language taken from the common law which might not be very familiar to other systems of law, the Special Rapporteur recommended that they be replaced by a new subparagraph (*c*) (A/CN.4/415, para. 156). If that meant incorporating the various elements on a more universal basis, he could accept the new subparagraph. If, however, it were to remove the difference between movable and immovable property, that was a different matter, since the situation with regard to movable property was not nearly so clear. In short, the article was not very satisfactory and, if it came to the worst, he would prefer all the subparagraphs in paragraph 1 to be deleted.

18. Paragraph 2 of article 14 was not couched in very clear terms and the Special Rapporteur suggested that, as recommended by the Government of Belgium, it be deleted, since it gave the impression that there was a conflict with article 7, paragraph 3. That was true and the paragraph could be dropped without difficulty.

19. The Special Rapporteur made two proposals concerning article 18. With regard to the first, which consisted of deleting the term "non-governmental" in paragraphs 1 and 4, he would recall that the difficulty of defining "State-owned or State-operated ships engaged in commercial service" had been noted during first reading. The purpose of the term "non-governmental" was therefore to add an element of precision, although it admittedly represented discrimination against some States. In the absence of a proper formula, he would agree with some reluctance to the deletion of the term. As to the second proposal, which was to add a new paragraph 1 *bis* concerning ships that were segregated State property, the suggested wording (A/CN.4/422 and Add.1, para. 26) was not very good, but Mr. Barsegov (2117th meeting, para. 1) and Mr. Shi (2115th meeting, para. 24) had made extremely interesting proposals in connection with the new draft article 11 *bis* which might help in arriving at a solution.

20. Article 19 (Effect of an arbitration agreement) was fully justified, for it merely recognized the supervisory power of national courts regarding an arbitration agreement. As for the choice between providing for arbitration relating to a "commercial contract" or arbitration relating to a "civil or commercial matter", the Special Rapporteur preferred the latter solution. The effect of that expression would, however, be to enlarge the scope of the exception recognized under the article, whereas the aim should be to narrow it.

21. There was no suggested change in article 20, but its position in the draft raised a problem, as had been noted by the Governments of Australia and Thailand. His own view was that the article should be placed elsewhere in the draft.

22. He had no objection to the addition at the beginning of article 21 of the traditional clause "Unless otherwise agreed between the States concerned". He also agreed to the deletion of the words in square brackets, "or property in which it has a legally protected interest", whose meaning was uncertain. The problem of the concept of "rights and interests", which had caused some difficulty on first reading, arose once again, but in a more serious form. Indeed, what was a right but "a legally protected interest"? As to the exceptions provided for in subparagraphs (*a*) and (*b*), he was strongly opposed to the deletion of the condition in subparagraph (*a*) reading: "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed". The Special Rapporteur considered that that condition was not necessary in view of the preceding phrase, but to delete it would, once again, extend the exceptions and, consequently, narrow the concept of immunity.

23. The need for article 23 was not self-evident, for the property referred to would in any event never be regarded as commercial property. The Special Rapporteur proposed the addition at the end of paragraph 1 (*c*) of the words "and serves monetary purposes". But what purposes could the "property of the central bank" serve other than monetary purposes? To make that precision would further erode State immunity and he was therefore not in favour of amending the subparagraph. The new wording proposed for paragraph 2 (A/CN.4/415, para. 240) was not an improvement. His own view was that the text as adopted should be maintained for reasons of balance, but with such improvements as the Drafting Committee might wish to introduce.

24. Turning to part V of the draft (Miscellaneous provisions), he said that article 24 as adopted on first reading was extremely comprehensive, providing as it did for service of process by means agreed upon by the States concerned, through diplomatic channels or by other means, including transmission by registered mail. The Special Rapporteur had simplified the provision in the proposed new text (*ibid.*, para. 248). However, in his view, service of process by mail was not the generally accepted practice. On the basis of the comments of several Governments, the Special Rapporteur proposed that the reference to a "special arrangement" in paragraph 1 (*a*) be deleted and that reference be made instead to any "applicable international convention binding" on the States concerned. However, the fact that such arrangements were not accepted by all legal systems was not a very convincing argument in favour of that deletion. Subparagraph (*a*) could perhaps be replaced by the words "in accordance with any international agreement or arrangement binding on the forum State and the State concerned", in order to cover all possibilities.

25. The Special Rapporteur did not propose any change to articles 25, 26 and 28. He did, however, propose a relatively important change to article 27, paragraph 2, in that the privilege accorded to a State party to proceedings before a court of another State would henceforth be confined to the defendant State. That was not a good idea, in his view, since States, by their very nature, should not be treated as ordinary parties to proceedings. It was not appropriate to seek guarantees from them, whether they were claimants or defendants.

26. Mr. MAHIOU said that his comments on articles 12 *et seq.* would coincide on certain points with those made

by the previous speaker. He noted that the Special Rapporteur recommended the deletion, in article 12, paragraph 1, of the condition relating to social security. Although he did not insist on its retention, he considered that that condition was sufficiently clear and would enable a link to be established between the contract of employment and the forum State. The Special Rapporteur also proposed the deletion of paragraph 2 (*a*) and (*b*), although the Commission had included those provisions on first reading to take account of a number of special situations. He would therefore be hesitant about following the Special Rapporteur on that point.

27. He would have no difficulty in accepting the suggestion by the Government of Spain for a new paragraph 2 of article 13 (A/CN.4/410 and Add.1-5), but wondered whether it was useful.

28. Many Governments had stressed the complexity and singularity of article 14, whose text was based on common-law concepts. In that connection, he agreed with the comments made by the Special Rapporteur, who thought it necessary to simplify the text and to eliminate several subparagraphs in order to avoid creating problems for countries which were not familiar with such concepts.

29. In article 18, the Special Rapporteur recommended the deletion of the term "non-governmental" in square brackets in paragraphs 1 and 4. That raised a substantive problem that had already been encountered in connection with articles 2 and 3. Just as it was sometimes difficult to define a commercial contract, it could also be difficult to define the commercial or non-commercial use of a ship. The Special Rapporteur's analysis of that problem in his second report (A/CN.4/422 and Add.1, paras 24-25) did not accurately reflect the position of the developing countries, especially when he stated that he had doubts "whether granting immunity to ships owned or operated by the developing countries is advantageous to them in the long run". The developing countries did not wish to create such a situation, which would be both unfair and unacceptable: what they wanted was to be able to invoke immunity from jurisdiction in certain circumstances where the public interest was involved. As in the case of a commercial contract, in which the public-interest purpose served as a subsidiary criterion in determining the nature of the contract, public interest could serve as a secondary criterion in determining the nature of the use of a ship. The position of the developing countries must not be presented as being excessive. In the case under consideration, the same reasoning should be adopted as for articles 2 and 3 and an attempt should be made to find a compromise that would take account of certain special circumstances when ships were used for governmental purposes in the public interest.

30. In support of his contention that the term "non-governmental" was inappropriate, the Special Rapporteur referred to such instruments as the 1926 Brussels Convention on the immunity of State-owned vessels, the 1958 Convention on the Territorial Sea and the Contiguous Zone and the 1982 United Nations Convention on the Law of the Sea (*ibid.*). His own interpretation of those instruments was somewhat different. The 1926 Brussels Convention and the 1958 Convention referred to ships which were used only on government non-commercial service: it could therefore be deduced *a contrario* that government commercial service existed. The terms used varied from one convention to another, but a distinction was always made between those two types of service. That distinction was also to be found in articles 96 and 236 of the 1982 Convention. The distinction between commercial and non-commercial government activity entailed a number of consequences from the jurisdictional point of view. The solution to that problem had to be patterned on the one proposed in the provisions of the new article 2 relating to commercial contracts (A/CN.4/415, para. 29). It had to be an equitable solution based on a criterion which was relatively clear, but which would also take account of certain particular situations.

31. Of the two expressions in square brackets in article 19, the Special Rapporteur preferred the second, which would have the effect of broadening the scope of the exception. He personally would be reluctant to adopt that view, for fear that that might create an opening that would enable courts unfairly to deny the jurisdictional immunity of a State. It was all too easy, outside the contractual field, to reach the point of disputing decisions which should be regarded as relating to acts performed in the exercise of the sovereign authority of the State. In order to illustrate the risks involved in the misinterpretation of certain terms, he referred to the *Pyramids* case. A contract for a tourism development project concluded in 1974 by an Egyptian Government agency with a foreign enterprise had provoked a general outcry both in Egypt and abroad, since public opinion had considered that the project might damage one of the seven wonders of the world. The contract had thus been impugned and the foreign enterprise had invoked the arbitration agreement to claim compensation for the work it had already done. The arbitral tribunal had ruled that it had jurisdiction not only with regard to the Government agency which had signed the contract with the foreign enterprise, but also with regard to the Egyptian State itself, which had, as the supervising State, approved the contract: in the view of the tribunal, mere approval—a unilateral act of the State—had made Egypt a party to the contract and hence to the arbitration agreement. Egypt had, of course, appealed the award, which had been rescinded.

32. That example showed that the jurisdiction of the forum State had to be extended, since arbitral tribunals, to which the parties usually entrusted their disputes, were sometimes tempted to go beyond their jurisdiction, whereas the judge of the forum was more likely to defend the prerogatives of the State. The example also showed that there was a tendency, whenever the State set its seal of approval on a commercial contract, to consider it as a party to the arbitration agreement and to dispute the validity of its actions, even when they were performed in the exercise of its sovereign authority. As matters now stood, he would therefore be in favour of retaining the first expression in square brackets in article 19, namely "commercial contract". Insidious jurisdiction was a danger to be avoided.

33. Still with regard to article 19, the Special Rapporteur had asked whether a position should not be taken on the problem of the enforcement of arbitral awards. Had a State which had accepted an arbitration agreement not also accepted the jurisdiction of the courts that were competent to enforce the award? He would not deal again with that question, to which he had referred in his earlier statement (2116th meeting), but he noted that caution was called for in that regard, since such an extension of the jurisdiction of the courts of the forum could lead to some questionable

results. He also recalled that acceptance of an arbitration agreement should not be confused with acceptance of enforcement proceedings.

34. Article 20, which was a kind of reservation clause on the settlement of the problem of nationalizations, was one of the elements of a global compromise and had been designed to make article 15 acceptable and safeguard the measures of expropriation and nationalization which could be taken by States. He was one of the members of the Commission who had proposed the article, but he was not satisfied either with its wording or with its position in the draft. In view of the ambiguous interpretations to which its provisions gave rise, he even had doubts whether it should be retained.

35. The Special Rapporteur made three recommendations on article 21 in his preliminary report (A/CN.4/415, paras. 217-219) and a fourth one in his second report (A/CN.4/422 and Add.1, para. 46). As in article 18, he recommended the deletion of the term "non-governmental", which he personally was in favour of retaining for the reasons he had already indicated; perhaps a solution to that problem could be found in the Drafting Committee. The concept of a "legally protected interest" might well be peculiar to certain legal systems. The concept of "interest" was, however, broader than that of "right" and, since the Commission was working in an area in which measures of execution had to be limited as much as possible, it would be wiser to retain that expression for the time being, both in article 21 and in article 22.

36. The Special Rapporteur also considered that there was no need to require a connection between the property in question and the object of the claim or the agency or instrumentality against which the proceeding was directed, or to make it a prerequisite for measures of constraint, and had explained his position on that point in his oral introduction (2115th meeting), referring to the *Letelier* case. It should, however, be pointed out that the problem called for solutions that varied according to the countries involved. Even in countries where there was a restrictive trend with regard to immunity, that link or connection was required. He believed the United Kingdom was the only country which had eliminated that requirement; in the United States of America, proposals along those lines had not been adopted. Besides, solutions adopted at the national level were not necessarily applicable for the purposes of an instrument that was universal in scope.

37. The new text of article 23, paragraph 2, proposed by the Special Rapporteur in his preliminary report (A/CN.4/415, para. 240) was an improvement on the adopted text. There was, however, still the problem of bank accounts, as referred to in both the preliminary report and the second report (A/CN.4/422 and Add.1, para. 44). The Special Rapporteur's position on that problem was not very clear and stood in need of explanation. He appeared to be proposing to revert to the original recommendation made in his preliminary report to add the words "and serves monetary purposes" to paragraph 1 (*c*) in order to protect the property of the central bank or any other monetary authority implementing the monetary policy of the State. He had some doubts about that suggestion, for the reason given by Mr. Calero Rodrigues, since a central bank could, in his view, not have anything but monetary activities. The expression "and serves monetary purposes" was therefore not clear. It would certainly give rise to problems if it were to have the effect of restricting the immunity of the State in that field. In the circumstances, he therefore preferred the earlier text.

38. He had no comments on articles 24 to 26 and shared the concerns of the Special Rapporteur, whose recommendations he supported. It would be for the Drafting Committee to decide whether those recommendations improved the texts and should therefore be adopted. Account should, however, be taken of the comments made by the Federal Republic of Germany and the German Democratic Republic on article 25, which were intended to prevent a default judgment from being rendered against a State by virtue of service of process.

39. Paragraph 2 of article 27 as adopted on first reading was preferable to the new text proposed by the Special Rapporteur (A/CN.4/415, para. 266) because the claimant State should enjoy the same rights as the defendant State, first for the reason given by Mr. Calero Rodrigues and, secondly, because of the need not to discourage States from entering claims. In some countries, the financial aspects of the proceeding were an important consideration. If a State acting as claimant were required to provide security, it might decide not to bring suit, thus calling its immunity from jurisdiction into question. That factor had to be borne in mind in view of the cost of some proceedings.

40. Mr. AL-KHASAWNEH paid tribute to the Special Rapporteur and to the States that had commented on the draft articles adopted on first reading. There were, however, still many points that called for in-depth consideration, which the Commission would not be able to complete at the current session if it took up all the draft articles. He would therefore comment only on articles 1 to 11 *bis*.

41. Article 1 (Scope of the present articles) was acceptable in terms both of its content and its place in the draft as a whole. The merger of articles 2 (Use of terms) and 3 (Interpretative provisions) in a single new article 2 was entirely warranted. However, the definition of the expression "commercial contract" was tautological, although that could be avoided by deleting the adjective "commercial" in paragraph 1 (*c*) (i) of the new text (A/CN.4/415, para. 29) and replacing it by "business" in paragraph 1 (*c*) (iii). In paragraph 3, the word "primarily" was redundant, since it made sense only if the nature test was applied primarily and an additional test was applied in the case referred to in paragraph 2 of article 3 as adopted. More importantly, the words "but if an international agreement . . . in determining the non-commercial character of the contract" were also redundant, bearing in mind article 11, paragraph 2. In fact, as it stood, paragraph 3 as a whole was merely recommendatory and served only to dilute the rule that a State which had concluded a commercial contract with a foreign non-State entity enjoyed immunity from jurisdiction under article 11, paragraph 2 (*b*). The text proposed by the Special Rapporteur for paragraph 3 was no doubt intended to reconcile differences of opinion on the weight to be given to the nature of the contract and to its purpose, but he could still not accept it. That left the question of determining what weight should be given to the non-commercial purpose of a contract whose nature and outward form were commercial. The comments made by Governments were not of much

help in that regard, since they were divided. However, any suggestion to give equal weight to the nature of the contract and to its purpose should be rejected. If such a suggestion were accepted, the judges called upon to interpret the future convention would face a very difficult task. And that task would not be any easier if they had to take account "primarily" of the nature of the contract, so that the purpose of the contract would then be only marginally and additionally relevant. In the first place, the purpose test was, by definition, subjective. Secondly, it was not inconceivable—it was even normal—that, in concluding a commercial contract, a State would be motivated both by commercial considerations and by considerations of public welfare. Thirdly, since the practice of States claiming immunity varied from one country to another, different solutions would be adopted depending on the claimant State in question—and that would be the opposite of unification.

42. In its comments, the United Kingdom Government had stressed that a mechanism already existed in article 11, paragraph 2 (*b*), under which a State could reserve its immunity at the time of the conclusion of the contract. Since the protection of private rights was the main reason for restricting immunity, however, when the non-State entity in question agreed to the invoking of immunity by the other party to the contract, namely the State, there was no reason why the State of the forum should question the consent of the non-State entity, except as a matter of public policy. It followed that, in certain cases, that consent would apply to contracts whose nature and purpose were both commercial, thereby cutting across the distinction between acts *jure imperii* and acts *jure gestionis* on which the restrictive theory of immunity was predicated. It was possible, for example, that a firm might, out of ignorance of the subtleties of that distinction or simply out of a wish to make quick profits, accept a clause whereby a State would reserve its immunity in respect of a contract whose nature and purpose were both commercial. Conversely, a State might, in order to guarantee the welfare of its citizens, conclude a contract with a foreign firm and agree to waive its immunity, even if the purpose of the contract was clearly a public one. In both cases, the mechanism provided for in article 11, paragraph 2 (*b*), would leave a great deal of room for market forces and could therefore hardly be described as appropriate. Surely the task of the law was to moderate the exercise of power, whether economic or political, and not to consolidate it. He had thus come to the conclusion that the purpose of the contract had to be taken as a criterion, but its subjectivity had to be reduced as much as possible in the interests of legal certainty and in order to establish a uniform régime. That could be done by listing a number of categories of commercial contracts for which the purpose test would be applied—for example, contracts for military purposes or contracts concluded for emergency assistance. An alternative solution would be to add a new paragraph 2 (*c*) to article 11, reading: "if the court is satisfied that the purpose of the contract is a public one".

43. In article 4 (Privileges and immunities not affected by the present articles), the scope of paragraph 2 should be broadened to include certain persons connected with the head of State, such as members of his family forming part of his household and servants attached to his personal service, and perhaps also prime ministers and ministers for foreign affairs.

44. Article 5 (Non-retroactivity of the present articles) was satisfactory, although there was considerable relevance in the comment made by the Australian Government on the value of imposing any restrictions on the application of the future convention. It was significant in that regard that, when the *Foreign Sovereign Immunities Act* had been adopted in the United States of America in 1976, claimants had begun to introduce lawsuits for cases going back to the 1940s, as Mr. Shi (2115th meeting) had pointed out.

45. Turning to article 6 (State immunity), he supported the proposed deletion of the words in square brackets. However, since the article had given rise to much controversy in the past both in the Commission and among publicists, he wished to comment on it in some detail. First, a tendency to opt for easy solutions in the matter of the codification and progressive development of international law had been discernible in the Commission and in the Sixth Committee of the General Assembly in recent years. For some topics, a framework approach was advocated in order to take account of diversity: such was the case with the law of the non-navigational uses of international watercourses and with international liability for injurious consequences arising out of acts not prohibited by international law. In the case of the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Commission had almost succumbed to the temptation of an optional régime which would have had the effect of decodifying the law of diplomatic and consular relations. In the case of the topic under consideration, the same reluctance to accept a single unified régime had led to the introduction of the words in square brackets in article 6 and also to the adoption on first reading of article 28 (Non-discrimination). Were those developments a sign of greater creativity or an admission that legislating for a heterogeneous world was wellnigh impossible? The latter was probably the right explanation. The Commission did legislate, of course, but the instruments it produced could not serve as a yardstick against which the activities of States could be measured with certainty. In other words, it engaged in codification, which led to the freezing of developments through customary law without the certainty it was supposed to offer in order to offset the loss of pragmatism and creativity that were part of customary law.

46. Secondly, the trading activities of States were nothing new. In the topic under consideration, the extreme richness of court decisions, administrative practices and municipal legislation contrasted with the total absence of decisions by international courts and a relative scarcity of diplomatic practice. There was no reason why that trend should suddenly be reversed. It was extremely unlikely that there would be many international court decisions or arbitrations, but it was very likely that national courts and legislators would produce more cases and laws pointing in two opposite directions—a restrictive approach in some countries and an absolute one in others. The raison d'être of codification was precisely to arrest processes that could lead to legal uncertainty. If the draft were expressly to relegate itself to a place of secondary importance, such uncertainty might ensue.

47. Thirdly, it had been argued that, since it was difficult to draw a distinction between *acta jure imperii* and *acta jure gestionis* in such a way as to arrive at a clear dichotomy, and also difficult to achieve world-wide agreement

among States concerning the exact dividing line between immunity and non-immunity, a grey area should be expressly recognized and left for subsequent regulation.

48. Problems of that kind were common to all drafts and any set of rules carried within it the seeds of its own destruction, but only an unwise draft would deliberately plant the seeds of its own ineffectiveness.

49. On the basis of those considerations, he was not in favour of retaining the words in square brackets in article 6. The furthest he would go in that regard was to agree to the suggestion by the Government of Spain for the inclusion in the preamble to the future convention of a paragraph reading:

> "*Affirming* that the rules of general international law continue to govern questions not expressly regulated in this Convention" (A/CN.4/410 and Add.1-5).

In a commendable effort at compromise, the Special Rapporteur had suggested the deletion of the words in square brackets and the inclusion in the draft of a new article 6 *bis* (A/CN.4/422 and Add.1, para. 17), and had invited members of the Commission to indicate their preference as between the Spanish suggestion and the new article. He personally preferred the Spanish suggestion because he doubted that article 6 *bis* stood much chance of approval by those in favour of the restrictive approach and he agreed with Mr. Reuter (2115th meeting) that, since a State favourable to the theory of absolute immunity would always raise objections, the new article was only a "temporary gift".

50. He agreed with Mr. Tomuschat (2116th meeting) on the need to study the relationship between article 7 (Modalities for giving effect to State immunity) and article 2 and also endorsed the drafting suggestions made by Mr. Al-Qaysi (*ibid.*, para. 43). As to article 8 (Express consent to the exercise of jurisdiction), he agreed with the amendment proposed by the Special Rapporteur in subparagraph (*c*) (A/CN.4/415, para. 93). With regard to article 9 (Effect of participation in a proceeding before a court), he had the same question as Mr. Al-Qaysi, namely whether a mistaken waiver could be corrected when the State invoking jurisdiction had itself instituted the proceedings. Such a situation, while most unlikely, was not inconceivable. In article 10 (Counter-claims), he welcomed the incorporation of the amendment suggested by the Government of Thailand as a new paragraph 4 (*ibid.*, para. 107).

51. As to part III of the draft ([Limitations on] [Exceptions to] State immunity), he agreed that the importance attached to the issue of the title, which had proved so controversial, had been disproportionate.

52. In article 11 (Commercial contracts), which he had already touched on in connection with articles 2 and 3, the use of the words "by virtue of the applicable rules of private international law", in paragraph 1, seemed to be based on the assumption that the choice of applicable law and the choice of jurisdiction were the same. Since that was not necessarily so, he would be grateful for further explanations by the Special Rapporteur. He also noted that, in the proposed new article 2, paragraph 3, the Special Rapporteur used the term "agreement" rather than "contract" when both parties to the instrument in question were States. That seemed to be the correct interpretation; but it would then follow that article 11, paragraph 2 (*a*), could be deleted, since a commercial contract (or agreement) between States on a Government-to-Government basis would in any event enjoy immunity from jurisdiction. He welcomed the Special Rapporteur's comment that the rules of private international law "often require some form of territorial connection" (*ibid.*, para. 116).

53. The proposed new article 11 *bis*, on segregated State property (*ibid.*, para. 122), had obvious merits, since it limited the abuse of domestic judicial proceedings against foreign States by distinguishing between the State itself and a State enterprise with segregated property. The examples cited by Mr. Shi were a reminder that the issue could not be overlooked. A question of principle that might arise was whether the draft should expressly make provision for an institution found only in one group of States. Ideally, that should not be done, but in an instrument intended for world-wide use it was important to arrive at a fair and equitable solution and he had no doubt that such would be the case if article 11 *bis* were adopted. The exact wording of the article should be left to the Drafting Committee.

54. Mr. AL-QAYSI said that he wished to conclude his observations on the topic by commenting on articles 21 to 28.

55. With regard to article 21 (State immunity from measures of constraint), he agreed with the Special Rapporteur's recommendation that the words "or property in which it has a legally protected interest" in square brackets be deleted, not only—as had already been stated—because their meaning was unclear, but also for the reasons set out in paragraph (4) of the commentary to the article, which stated:

> . . . the interest of the State may be so marginal as to be unaffected by any measure of constraint; or the interest of the State, whether an equity of redemption or reversionary interest, may by nature remain intact irrespective of the measure of constraint placed upon the use of the property.[5]

He also agreed with the Special Rapporteur that the term "non-governmental" in square brackets should be deleted. For the reasons advanced by the Government of Qatar, he agreed with the suggestion that the words "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", in subparagraph (*a*), should be deleted.

56. As for article 22 (Consent to measures of constraint), he agreed with the Special Rapporteur that the words "or property in which it has a legally protected interest", in square brackets in paragraph 1, should be deleted for the reasons stated in connection with article 21.

57. In article 23 (Specific categories of property), he was in favour of deleting the term "non-governmental" in square brackets in paragraph 1, but he was not sure exactly what wording the Special Rapporteur was recommending for paragraph 1 (*c*). In his preliminary report (A/CN.4/415, paras. 239-240), the Special Rapporteur proposed the addition of the words "and serves monetary purposes" to that subparagraph and the reformulation of paragraph 2; in his second report (A/CN.4/422 and Add.1, para. 45), he proposed that paragraph 1 (*c*) be reformulated and that paragraph 2 be deleted, going on to suggest (*ibid.*, para. 46) that article 21 be modified accordingly, but then again

[5] *Yearbook . . . 1986*, vol. II (Part Two), p. 18.

proposing (*ibid.*) the addition of the words "and serves monetary purposes" to the end of paragraph 1 (*c*).

58. How exactly did matters stand? He was in favour of the addition to paragraph 1 (*c*) proposed by the Special Rapporteur, but was not sure whether paragraph 2, as redrafted in the preliminary report, was to be retained or deleted. If it were retained, as presumably was the Special Rapporteur's intention, then the proposals made in paragraph 45 of the second report would have to be modified. But there was another puzzle that needed resolving. The Special Rapporteur had clearly indicated that he was proposing a redraft of paragraph 2 in response to the comments made by the German Democratic Republic. In that connection, it should be noted that the German Democratic Republic gave as the reason for its proposal the fact that paragraph 2 as adopted on first reading would annul the special precautionary measure in question. He failed to see the logic of that reasoning in view of the commentary to article 23, which stated that the specific categories of property listed in paragraph 1 (*a*) to (*e*) were to be protected unless the State had allocated or earmarked the property or had specifically consented to the taking of measures of constraint.[6] In both cases, the consent of the State in question—implied in the former case, express in the latter—formed the basis for lifting the special protection. Why should such consent be considered a negation of protection? Even more surprising was the text of paragraph 2 as reformulated by the Special Rapporteur in response to the comments of the German Democratic Republic. The proposal was that, "notwithstanding the provisions of article 22"—in other words, notwithstanding the express consent of the State—the special protection of the categories of property listed in paragraph 1 could be lifted only when such property had been allocated or earmarked by the State in question for the satisfaction of the claim which was the object of the proceeding. Did that mean that express consent would not matter unless it was coupled with implied consent through allocation or earmarking? If so, he was unable to agree with such reasoning and preferred the wording of paragraph 2 as adopted on first reading. The only changes that needed to be made in article 23 were to delete the term "non-governmental" in paragraph 1 and to add the words "and serves monetary purposes" to paragraph 1 (*c*).

59. With regard to article 24 (Service of process) and article 25 (Default judgment), he shared Mr. Shi's view (2115th meeting) that the words "if necessary" in paragraphs 3 and 2 of those articles, respectively, should be deleted. He also agreed with the recommendation made by the Special Rapporteur in response to the comments of the United Kingdom and the Federal Republic of Germany that paragraph 2 of article 27 (Procedural immunities) be amended so as to apply only to a defendant State. In view of the doubts he had already expressed (2116th meeting) about the workability of the new draft article 6 *bis*, he considered that article 28 (Non-discrimination) had a place in the draft.

60. Lastly, noting that the Special Rapporteur had referred to the possibility of including a part VI of the draft on the settlement of disputes, he agreed with Mr. Shi that now was not the time to do so. If the draft articles were to take the form of an international convention, it would be the task of the diplomatic conference to look into that matter.

61. Mr. OGISO (Special Rapporteur), referring to article 23, said that the only amendment he was proposing related to paragraph 1 (*c*) and was to add the words "and serves monetary purposes"; paragraph 2 would remain unchanged.

62. Mr. AL-QAYSI thanked the Special Rapporteur for that explanation, which did not, however, entirely meet the point he had raised in connection with paragraph 2. He would look forward with interest to the Special Rapporteur's summing-up of the debate.

63. Mr. TOMUSCHAT said that, unlike several of the speakers who had preceded him, he was not in favour of the deletion of article 12, which he thought was useful and fully justified. Evidence for that position could be found in a judgment of the Swiss Federal Tribunal of 22 May 1984. The embassy of an Asian country in Bern had hired an Italian national in 1958 to serve as a radio and telex operator. That person had subsequently been entrusted with different functions, had finally been downgraded and had been dismissed in 1979—arbitrarily, according to him. In order to vindicate his rights, he had sued his employer. According to article 37, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, since the person belonged to the service staff of the mission, he did not enjoy diplomatic immunity and did not have the status either of a diplomat or of a civil servant of the country concerned: his relationship with that country had been based on a simple work contract. It might be asked what else he could have done, other than bringing suit against the country in question, in order to assert his rights. Should he have travelled to a far-away country to institute judicial proceedings? Clearly, to deny access to local courts in such instances would amount to a denial of justice. He was convinced that the guarantee embodied in the second sentence of paragraph 1 of article 14 of the International Covenant on Civil and Political Rights would not be respected if access to a competent tribunal for the determination of "rights and obligations in a suit at law" were made excessively difficult. In the instances covered by article 12 of the draft, the local forum was the only convenient forum.

64. He could not accept the contention that the person concerned could turn to his Government to request it to bring a claim against the employer State. That option was no remedy, since, in the context of diplomatic protection, the individual's fate depended entirely on a discretionary decision of his Government. Many Governments would be reluctant to espouse the modest claim of one of their nationals against a foreign State, for fear of jeopardizing their relations with that State. If the Commission wished to remain faithful to the basic idea that an individual who considered that his rights had been violated should have an effective remedy, it must acknowledge the jurisdiction of local courts.

65. As to the exceptions provided for in paragraph 2 of article 12, they deserved close scrutiny. In paragraph 2 (*c*), for example, the decisive date should not be that of the contract of employment: in the example he had just given, the employee had been hired 21 years before the dismissal decision had been taken!

[6] *Ibid.*, p. 20, para. (7) of the commentary.

66. He also preferred the adopted text of article 13, for, as he had just said in connection with article 12, enabling a person who believed that he had suffered damage as a result of the actions of a foreign State to appeal for a judicial remedy was the simplest and most effective way of settling the matter. Why should a foreign State, because it enjoyed immunity, be able to evade responsibility for the acts of its agents in another country? Those agents were required to respect local laws and regulations: if they did not, why should the affected individual be put in a situation which amounted to a denial of justice? There again, giving such an individual the option of bringing a suit before the courts of another State was not a real solution.

67. He did not think, however, that the requirement that the author of the act must have been present in the territory of the forum State should be deleted. It was not enough to stipulate that the damage must have occurred in the territory of the forum State—or, as the Special Rapporteur was proposing, that the act or omission must have occurred in the forum State: that would be to enlarge the scope of article 13 unduly. Under the doctrine of extraterritorial jurisdiction, acts and their effects were seen as an inseparable whole. There was a basic difference between the situation where a foreign State acted within its borders, exercising the full range of its sovereign power, and one where agents of a foreign State acted in the territory of the forum State. No State was sovereign in the territory of another State and its agents were bound always to respect local laws: territorial sovereignty always prevailed, except as otherwise agreed. If it were enough that the damage had occurred in the forum State, the entire problem of transboundary air pollution could be settled in a unilateral fashion by the domestic courts of one of the States involved. That was not a viable dispute-settlement model, however, and that was why transboundary harm gave rise to international disputes that had to be settled in the traditional ways listed in Article 33 of the Charter of the United Nations. On that point, he shared the views expressed by Mr. Calero Rodrigues.

68. He agreed with the Special Rapporteur that the text of article 14 should be radically simplified. Paragraph 1 (*a*) was unnecessarily complicated for the expression of a very simple idea, namely that actions concerning immovable property should be able to be heard by the courts of the country where such property was located. The Commission might adopt the wording of article 31, paragraph 1 (*a*), of the 1961 Vienna Convention on Diplomatic Relations, which referred to an action "relating" to immovable property situated in the territory of the receiving State. In many legal systems, the reference to an "interest" in immovable property might be confusing. As a matter of principle, a universal treaty should never bear the hallmark of a single legal system. Paragraph 2 of article 14 should be deleted: immunity should never be invoked in a case against a private individual.

69. Referring to article 18, he said that, before hearing Mr. Mahiou's statement, he had thought that all members of the Commission supported the deletion of the term "non-governmental" throughout that provision. The term brought the number of different categories of ships to four and made the provision too complicated to be easily applied.

70. Article 19 was a difficult text, but its provisions were extremely important. The underlying idea was that, if a State and a foreign natural or juridical person had agreed to settle their differences by way of arbitration, neither of the parties must be allowed to obstruct the arbitral proceedings at a later stage in order to prevent the award from being recognized or enforced. If at that stage the foreign State could invoke its immunity, the entire arbitral process might be rendered nugatory. That was the idea that must be clearly expressed in the text by referring specifically, as the Government of Qatar had proposed, to the recognition and enforcement of the award.

71. With regard to article 20, some members of the Commission held that no claim relating to measures of nationalization should be entertained. It was true that, when a State nationalized private property, it was making use of its sovereign powers. But article 20 did not establish a rule: it was only a disclaimer. He did not see what useful purpose it could serve and, like Mr. Mahiou, was not entirely convinced by the arguments put forward by the Special Rapporteur in his second report (A/CN.4/422 and Add.1, para. 41).

72. Article 21 protected private property to an extent that was wholly unjustified. He took by way of an example the building in New York where his country's mission to the United Nations rented a floor. Should that entire building be immune from any measures of constraint because the Federal Republic of Germany had a legally protected interest in it in the form of a rental contract? Article 21 as it now stood could give that impression. There was, however, no justification for creating such obstacles to normal business relations. Measures of constraint should be excluded only if the enjoyment of its rights by a foreign State was affected, and that was certainly not the case in the example he had given. He therefore agreed with the Special Rapporteur's proposal to delete the words in square brackets in the introductory clause. The same comment held true for the reference to possession or control: measures of constraint should be excluded only if they might affect possession or control. The scope of the article should therefore be reduced and measures of constraint be excluded only if they might affect the foreign State's exercise of its rights.

73. Mr. REUTER said he agreed that articles 1 to 11 should be referred to the Drafting Committee, together with the proposed new article 11 *bis* (A/CN.4/415, para. 122) and some of the subsequent articles.

74. With regard to article 12, he was on the whole in favour of the proposals by the Special Rapporteur (*ibid.*, para. 133), even though the article was still not entirely satisfactory.

75. He was somewhat perplexed by article 13, including the proposed new paragraph 2 (*ibid.*, para. 143). While it went without saying that personal injury or damage to property would give rise to claims for compensation, it was difficult to determine the rules of law whose violation might be advanced as the reason for such claims. Mr. Tomuschat was convinced that it was the rules of national law, and the case of automobile accidents was often mentioned in that regard. If that was the interpretation to be given to the article, however, then the new paragraph 2 was unnecessary. Perhaps the provision should be interpreted more broadly as applying to acts or omissions that constituted a violation of the rules of international law: in that case, a reference to those rules would be justified. In positive international law, however, the only remedy available to the victim of a

violation of international law committed by a foreign State was to request the State of which he was a national to take action in the context of diplomatic protection—something that that State might well refuse to do, as Mr. Tomuschat had just pointed out. It was therefore necessary to know whether the intention in the article was to give individuals who had suffered damage or injury the right to act directly against the foreign State to which the damage or injury could be attributed. That was, of course, a laudable approach, but it had every chance of remaining entirely theoretical. Nevertheless, if such was the purpose of the provision, paragraph 2 should be amended and, in that connection, the proposal by Spain would either go too far or not go far enough. To be perfectly clear, it should be expressly stated that, if an individual did not enjoy adequate protection and had not obtained satisfactory results through the normal channels of public international law, he could take direct action. That solution was defensible from the theoretical standpoint, for it was possible to argue, in line with the decision in the *Société européenne d'études* case, that when a State submitted a claim to secure the diplomatic protection of its nationals, it did so in order to obtain compensation for damage it had suffered itself. In any case, the Commission should review article 13, decide on the approach it wished to adopt therein and amend the text accordingly.

76. In article 14, the link between the property in question and the territory of the State of the forum should be specified in paragraph 1 (*b*) and the word "interest" should be deleted for the reasons given by Mr. Tomuschat; failing that, the word should be replaced by an expression which did not come from the vocabulary of the common law.

77. It should be made clear whether the subject of article 16 was duties, taxes and other similar charges in general or exclusively those relating to an activity or property that did not enjoy immunity. As to article 17, it would be better not to use terms from the sphere of private international law in paragraph 1 (*b*). A more general formulation stressing the links between the company and the territory of the State of the forum might be preferable.

78. A great deal of time and effort had gone into the formulation of article 18 and it was difficult to express an opinion on it without a detailed knowledge of maritime law. As to the proposed deletion of the term "non-governmental", he could see why reference might be made to the concept of purpose or object to describe certain operations, situations or entities, but believed that precision was necessary. While it was perfectly understandable, as Mr. Mahiou had suggested, that, in certain exceptional circumstances, ships should enjoy a broader form of immunity, those circumstances should be spelled out. In any case, the Commission was obliged to reconsider the article in the light of the comments made by the Federal Republic of Germany and the United Kingdom, among others.

79. Article 23, paragraph 1 (*c*), should be made more specific, for it could not be said that all the property which a State placed in banks in the territory of another State was used for commercial purposes. The property in question was the type of deposits that played a particular role as monetary guarantees in the context of the international banking system. A special definition for such deposits was probably common in banking circles.

80. In conclusion, he said that the draft articles called for a number of general comments, which applied to the new draft article 11 *bis* as well. The texts proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (2117th meeting, para. 1) for that article were not without merit, but he had some reservations about them. It had already been stated that the entire set of articles should enunciate rules of international law that did not yet exist, as demonstrated by the fact that the various opinions expressed primarily reflected national interests. Of course, he understood why States might want immunities that were as strict as possible, but, on hearing the advocates of the theory of absolute immunity, he wondered whether they were not primarily concerned about the problems raised by intervention. As soon as civil or commercial—in others words, contractual—matters came into play, there was a struggle to gain the power bestowed by the law: if a State were granted immunity, that would mean that only the courts of that State had jurisdiction and that only its legal system, including its basic legislation, would be applicable. Small States wanted to protect themselves, and that was perfectly understandable, but the issue was primarily one of intervention. As Mr. Bennouna (2117th meeting) had pointed out, the balance of power had to be borne in mind, even if many contracts concluded in respect of raw materials showed that countries which were weak, or which believed they were, were capable of suddenly becoming strong.

81. It was interesting to note that, so far, no one had stated that the rules to be formulated must be peremptory and absolute: he would have done so if he had had time to make comments on article 28. In any event, however, it was always the more powerful of the two parties involved that would decide whether immunity should be granted or not, whether its own courts had jurisdiction and, consequently, whether its own law was applicable. That was why he feared that the text that would finally be adopted, through sheer weight of numbers or political influence, both in the Commission and in the Sixth Committee of the General Assembly, would be highly unsatisfactory. The real rules of international law were common rules, such as those worked out in CMEA or EEC. Whatever reservations there might be with regard to international arbitration and the problems to which it could give rise, it did point to the course to be followed, for the future lay in genuine joint international legislation. The Commission should reconsider the topic in that light as soon as possible.

The meeting rose at 1 p.m.

2120th MEETING

Friday, 16 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey,

Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/422 and Add.1,[3] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[4] ON SECOND READING (*continued*)

1. Mr. BENNOUNA said that the discussion on the topic under consideration put him in mind of the classic doctrinal debate as to whether the general principles of international law "recognized by civilized nations" were derived from domestic law or from international law. It was always a mistake to treat internal and international law as two distinct and tightly partitioned spheres. In fact, they continually interpenetrated and enriched one another. In the particular case of jurisdictional immunities, there could be no doubt that immunity was granted or refused on the basis of the internal jurisdictions of States, but in applying their internal laws States also took account of certain international rules. The draft should not attempt to impose strict and uniform rules but should confine itself to laying down general guidelines. Adoption of the draft convention would signal not the end of the ongoing dialectical process between internal law and international law, but simply the completion of a certain stage within that process. As he had suggested when speaking (2117th meeting) on articles 1 to 11, the draft should include a clause providing for the articles to be reviewed after a period of, say, five or ten years. That would make it clear that the text was not intended to be definitive and could be amended or supplemented in due course. Such an approach would make it easier to reach agreement and would help to overcome the somewhat pessimistic attitude he detected in some of the comments by members.

2. With regard to article 12, he agreed with the Special Rapporteur's recommendations in his preliminary report (A/CN.4/415, paras. 131-133). The problems in connection with article 13 were more complex. Several Governments had pointed out that the question of personal injuries and damage to property was governed by rules concerning State responsibility and was out of place in the present draft. The new paragraph 2 proposed by the Special Rapporteur (*ibid.*, para. 143) did not deal adequately with that problem, and he was therefore opposed to it. On the other hand, deletion of the phrase "and if the author of the act or omission was present in that territory at the time of the act or omission" would, he feared, make the scope of the article still wider. The phrase should be retained. In fact, the article as a whole required further in-depth consideration by the Commission.

3. He agreed with the Special Rapporteur's recommendations in respect of articles 14 and 18 and noted that he proposed no amendments to articles 15, 16 and 17.

4. With regard to the alternative expressions in square brackets in article 19, the concept of a "commercial contract" was sufficiently broadly defined in article 2, on the use of terms, and should be employed consistently throughout the text in order to avoid confusion.

5. He associated himself with other members who had questioned the need to include article 20 in the draft. However, if the Commission decided to retain it, he agreed with Mr. Calero Rodrigues (2119th meeting) that the article was out of place in part III and should be transferred to part I as a safeguard clause.

6. Turning to part IV of the draft, deletion of the phrase "or property in which it has a legally protected interest" from article 21, recommended by the Special Rapporteur in accordance with the views of a number of Governments, would not resolve the problem of property of the kind envisaged. Admittedly the expression "legally protected interest" was not entirely satisfactory, and he would suggest that it be replaced by a reference to property in which the State had a right *in rem*. The same could be done in article 22. The proposed deletion of the term "non-governmental" from article 21 (*a*) was acceptable, but he was opposed to deleting the words "and has a connection with the object of the claim . . .", which would excessively broaden the scope of the provision.

7. For reasons stated earlier, he agreed to the deletion of the term "non-governmental" in article 23, paragraph 1, but did not share the Special Rapporteur's view that the words "and serves monetary purposes" should be added to paragraph 1 (*c*). Paragraph 2 was superfluous and should be deleted. The reference to article 21, which was sufficient in itself, was merely confusing.

8. Article 28 gave rise to a number of problems, as the Special Rapporteur himself appeared to acknowledge by making its retention contingent upon the adoption of the proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17). While he was opposed to article 6 *bis*, he also considered article 28 to be extremely complex and capable of endangering the draft as a whole. The Government of Australia was right in saying that the article was concerned not with the question of discrimination or non-discrimination, but with that of reciprocity of treatment. In that connection, the crucial provision in paragraph 2 (*a*) was too broadly worded. Surely the mere fact that a State considered another State to be applying a provision restrictively should not be enough to authorize the former State to do likewise. That was, no doubt, what normally took place in practice, but the draft should at least attempt to introduce some morality.

9. Lastly, he had considerable doubts about the whole of the proposed part VI of the draft and would suggest that the Commission consider the question of the settlement of disputes in greater depth at the next session.

10. Mr. ROUCOUNAS thanked the Special Rapporteur for his meticulous work, which would greatly assist the Commission in its second reading of the draft articles. It

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

[2] *Ibid.*

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

[4] For the texts, see 2114th meeting, para. 31.

would, however, be useful if all of the observations made on a given set of articles could in future be grouped together so that the Commission would have a full picture of the situation. Such observations were of particular value to those who had not been members of the Commission from the start of the discussion on a particular topic.

11. Article 13 laid down an exception to the rule of the jurisdictional immunity of States in certain cases of injury to the person or damage to tangible property. Under the terms of the article, individuals could seek compensation before the courts for damage caused by an act or omission attributable to a foreign State which occurred in the territory of the forum State. According to the commentary to the article (formerly article 14),[5] the provision mainly covered traffic accidents or accidents involved in the transport of goods and persons by rail, road, air or waterways, for, although such accidents were insurable risks, insurance companies might hide behind the immunity of their clients in order to create difficulties with respect to compensation. The article did not, however, apply to cases where there was no physical damage; in other words it did not apply in the case of damage to reputation or to contractual, economic or social rights. For the article to apply, two conditions had to be fulfilled. First, the act or omission must occur in whole or in part in the territory of the State of the forum; and secondly, the author of such act or omission must be present in that State at the time of the act or omission. It was the latter condition that pin-pointed the scope of article 13, since the observation in the commentary to the effect that the cases contemplated by the article were rare was valid only on a provisional basis. For instance, the commentary also stated that the article would apply to certain specific cases of damage, such as that caused by speedboats—something which did not seem to correspond exactly to the scope it might acquire in future, in view of the pace at which relations of all kinds were developing in the modern world.

12. He further noted the reference in the commentary to "cases of shooting or firing across a boundary or of spillover across the border of shelling" (para. (7)), in which connection he considered it necessary to provide that armed conflict would be an exception. Yet it was also necessary to cover the questions of the stationing of foreign armed forces on a State's territory, the passage of armed forces or military equipment through that territory, and a whole range of possible accidents connected with the use of nuclear power. He therefore wondered whether it sufficed to make reference to existing conventions, which, in any event, were not universally binding. The Special Rapporteur had stated that a *renvoi* by means of the phrase at the beginning of article 13, "Unless otherwise agreed between the States concerned", guaranteed that international conventions would not be affected. But the question was whether the intention was to enlarge upon a rule already agreed upon by the parties and recognized under a number of important conventions that dealt with the use of nuclear power.

13. As to the proposed new paragraph 2 (A/CN.4/415, para. 143), a *renvoi* to rules of State responsibility under international law was not sufficient, since what was involved was the jurisdiction of the court to inquire into a certain area of activity that was attributable to the foreign State. Clearly, the paragraph was needed, but it should be much more elaborate. The reference to the physical presence of the author of the act or omission in the territory of the forum State should be retained, at least for the time being, for that would limit the scope of the article.

14. He supported the Special Rapporteur's proposal with regard to article 14 (*ibid.*, para. 156), and also agreed that reference to certain legal systems alone, or to institutions governed by a number of legal systems, would not be advisable. The point could best be dealt with by appropriate drafting changes. In that connection, he would remind members that, in a different but related field—the adoption of the United Nations Convention on International Bills of Exchange and International Promissory Notes,[6] which had been considered at length by the Sixth Committee of the General Assembly—the question had arisen of the extent to which it was necessary to search for a balanced text that was intelligible to all and did not lean too much in favour of one legal system or another: the consideration of that question had for a time blocked the adoption of the Convention.

15. He concurred with the Special Rapporteur that a more detailed explanation should be included in the commentary regarding the scope of article 15 as it related to computer-generated works. More detailed explanations with regard to plant breeders' rights would also be welcome. He further agreed that specific aspects of the question should not be cited, since that would lead to considerations relating to other activities that were not envisaged.

16. Article 18 was, of course, of a residual nature. Historically, the question of the jurisdictional immunities of States had arisen with regard to ships, because ships in a foreign port were a point of contact between the legal systems of at least two States. Thus the question was already widely regulated by treaty, and a wealth of jurisprudence dating back to the nineteenth century confirmed the rule concerning the submission of ships not engaged in government service to the courts of the forum State. The expression "ship engaged in commercial [non-governmental] service" was therefore an innovation and was not founded on practice. Moreover, it was clear from article 236 of the 1982 United Nations Convention on the Law of the Sea that immunity flowed from the non-commercial character of the ship and not from its non-governmental character. As to the cases contemplated in paragraph 2 of article 18, it would be useful if the Commission could confine itself more or less to parallel provisions and not go beyond the 1926 Brussels Convention on the immunity of State-owned vessels. In particular, it should be careful not to overburden the text and so make it difficult to interpret.

17. The question of pollution must be covered. Also, the statement in the commentary to the article (formerly article 19) that the production of a certificate signed by the diplomatic representative of the State to which the ship or cargo belonged was of course governed by the rules of procedure applicable in the State of the forum[7] called for

[5] *Yearbook . . . 1984*, vol. II (Part Two), pp. 66-67.

[6] General Assembly resolution 43/165 of 9 December 1988, annex.

[7] *Yearbook . . . 1985*, vol. II (Part Two), p. 63, para. (18) of the commentary.

fuller explanation, failing which he was not certain whether such a provision could be accommodated in the article. Further explanations were also required with regard to the new paragraph 1 *bis* proposed by the Special Rapporteur (A/CN.4/422 and Add.1, para. 26), which should be discussed as a matter of priority at the Commission's next session. If it were decided to include such a provision in the draft, however, it should be incorporated in the new article 11 *bis*.

18. The choice between the expressions "commercial contract" and "civil or commercial matter" in article 19 should not give rise to undue controversy. The difficulty could perhaps be removed by wording along the following lines: "a legal act which, under the present articles, falls within the jurisdiction of the court of the forum".

19. Lastly, with regard to article 20, he would point out that, some 40 years before, Lauterpacht had said, in a well-known article in the *British Year Book of International Law*, that the court of the forum had nothing to do with the legislative acts of foreign States, since when the controversy over that matter had been never-ending. He would, however, have no major objection to the provision if members favoured an express reservation with regard to the extraterritorial effects of measures of nationalization. The word "cases", in the title of the article, required further reflection; possibly what was meant was the "effects" of nationalization.

20. The CHAIRMAN, speaking as a member of the Commission, joined previous speakers in thanking the Special Rapporteur for his excellent reports, which were distinguished by the effort to develop proposals that offered solutions suitable for a compromise.

21. In endeavouring to achieve a generally acceptable result, the Commission should continue to be guided by the need to reaffirm the principle that, in accordance with their sovereign equality, States and their property enjoyed jurisdictional immunity. Only on that basis was it possible to define clearly the exceptions to immunity which, to a large extent, obviated the need for more far-reaching restrictions on the basic principle and thus helped to ensure unequivocal administration of the law. A legal régime governing the jurisdictional immunities of States and their property should strike a careful balance between the international legal principle of the immunity of States, the exceptions to that principle and the legal remedies for preventing improper use of the relevant rules. Only in that way would it be possible to arrive at an instrument which served peaceful international co-operation among States that were equal in rights but different in economic strength.

22. As a general remark regarding the bracketed phrase "and the relevant rules of general international law" in article 6, it was gratifying to note that the Special Rapporteur had followed the thinking of those who favoured deleting it. He personally did not think that the phrase should be reintroduced, even in the preamble. To do so would be to open the door to unwarranted restrictions on immunity and would, indeed, be tantamount to a reservation that would lead to the dissolution of the entire future convention. That would undermine the desired legal guarantees. An international agreement which contained such a sweeping reservation could not serve its purpose of stabilizing international relations, particularly in such a complex area as the immunity of States and their property. Also, there was no need for such a proviso, since under the draft articles States could agree to depart from their terms. It would acquire meaning only in cases where the parties disagreed on the interpretation of the convention, in which case they could seek an agreed solution by recourse to suitable means. It would be unfortunate if the convention itself were to open the way for a one-sided interpretation.

23. To meet the position of States which favoured further restrictions, the Special Rapporteur had, in his second report (A/CN.4/422 and Add.1, para. 17), proposed a sort of disclaimer in the form of the new article 6 *bis*, whereby States would be able to narrow the immunity of foreign States in a formal declaration which would not, however, take effect against States which objected within 30 days. If that proposal were adopted, it would destroy the unity of the rules laid down in the draft. It was also clear from that proposal that the additional exceptions contemplated were not a matter of "general international law" but of specific agreement between the States concerned. He did not think that article 6 *bis* would solve the problem.

24. His second general remark also concerned legal equality. Although the Special Rapporteur had taken account of the reservations expressed by the socialist States in an attempt to ensure that they would not be at a disadvantage, the proposed new article 11 *bis* (A/CN.4/415, para. 122) did not take sufficient account of the practical problems involved. The draft must be formulated in unambiguous terms so that an individual socialist foreign trade enterprise could not be identified with the State; otherwise the draft would be of no value to socialist States.

25. The practice in all socialist States was for certain clearly delimited parts of socialist property to be transferred to independent juridical persons exclusively for the exercise of commercial activities. Such persons acted on their own behalf, were liable to the extent of their own assets, did not act for the State and could not therefore claim or waive immunity. Consequently, the State could not be equated with such juridical persons and was not answerable for liabilities incurred by them. Nor, of course, could one State enterprise be held accountable for the liabilities of another.

26. Regrettably, it was the practice of some States to withhold immunity from the enterprises of socialist States while treating them as instrumentalities of the State, claiming that a socialist State was liable to the extent of all its assets for the obligations of its individual juridical persons. That led to situations in which the State concerned first had to appear before the courts of the forum State in order to secure respect for its legal order. Even if it succeeded, which was not always the case, the proceedings frequently cost a great deal of money. Care should be taken to ensure that the future convention would not be interpreted to mean that the legal order of some States in foreign trade was recognized only if they had paid an appropriate fee to a law firm of the forum State. He knew of a number of cases in which the German Democratic Republic had been held liable in the United States of America as a secondary defendant in proceedings involving foreign trade enterprises of the German Democratic Republic that were regarded as agencies or instrumentalities of the State. It had been a complicated and costly way to explain that, as a State, the German Democratic Republic was in no way answerable for the business transactions of such enterprises.

27. It was contrary to the principle of the sovereign equality of States to deny a State the right to invoke immunity for commercial transactions yet make it liable, in disregard of its legal order, for any commercial transaction performed by its legally independent enterprises. No State could accept such a situation. Accordingly, the German Democratic Republic had suggested that the following new paragraph 2 be incorporated in article 3:

> "2. The expression 'State' as used in the present articles does not comprehend instrumentalities established by the State to perform commercial transactions as defined in article 2, if they act on their own behalf and are liable with their own assets." (A/CN.4/410 and Add.1-5.)

Such a provision could help to make the draft articles more acceptable to many States and, moreover, was not unusual. Article 27, paragraph 1, of the 1972 European Convention on State Immunity, for instance, provided that "the expression 'Contracting State' shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions". That, too, could provide a possible basis for a clear-cut arrangement. In that connection, the Special Rapporteur had proposed, in the light of the comments made by the Federal Republic of Germany and the United Kingdom on article 3, that the following text be added at the end of paragraph 1 (*b*) (iii) of the new article 2 (A/CN.4/415, para. 29):

> ". . . provided that a State enterprise which is distinct from the State, which has the right to possess and dispose of segregated State property and which is capable of suing or being sued shall not be included in the agencies or instrumentalities of that State, even if that State enterprise has been entrusted with public functions".[8]

That was an amendment that would remove the doubts of many States.

28. He endorsed the Special Rapporteur's efforts to harmonize articles 2 and 3 and considered that the wording proposed for paragraph 3 of the new article 2 would facilitate balanced application of the "nature" and "purpose" criteria in determining the commercial character of a contract.

29. The notions of "interests of a State" and "property in the control of a State", in article 7, caused some difficulty and should be either deleted or precisely defined. He welcomed the introduction of the expressions "forum State" and "foreign State" and trusted that they would be consistently used in other articles for ease of comprehension. The use of the terms "agencies" and "instrumentalities" would be appropriate only if they were more precisely defined in article 2. It would be advisable for courts to be required *ex officio* to examine whether or not there was immunity.

30. Adoption of the suggestion by Thailand with respect to article 10 would weaken the very foundation of the article, and the proposed new paragraph 4 (*ibid.*, para. 107) might open the door to abuse of the right to make a counter-claim. It should either be made more specific or be deleted.

31. The title of part III of the draft again reflected the divergent interests of States, which should, however, ultimately be reconcilable. For his own part, he considered it important to use the word "exceptions", since immunity was the rule and limitations were the exception. He would not favour deferring the question, for it was a key issue, although he appreciated the fact that the Special Rapporteur's proposal to do so was made in the hope that the issue might lose significance if consensus could be reached on the various rules.

32. The wording of article 11—on the main exception to the principle of State immunity—was particularly important and it might be a good idea to begin with the phrase "Unless otherwise agreed . . .". The words "If a State enters into a commercial contract . . ." were vague and should be replaced by more precise language in order to underline the obligation arising for a State out of a commercial contract and also the legal relationship with the forum State. In his view, such a provision, which had been proposed by the previous Special Rapporteur in his fourth report,[9] was essential, particularly since some States tended to establish jurisdiction on the basis of extremely vague premises. It was therefore regrettable that the Special Rapporteur had not followed the suggestion that it be made clear that there must be a link between a given dispute and the forum State. Care should be taken to ensure that the future convention would not be used to support the practice of a unilateral extension of jurisdiction in a way that was attractive for the plaintiff but disadvantageous to the defendant. He would propose a reformulation along the following lines:

> "Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State if a proceeding is based on an obligation of the State arising out of a commercial contract between the State and a foreign natural or juridical person and the commercial activity is partly or wholly conducted in the State of the forum."

33. While he appreciated the Special Rapporteur's efforts to overcome certain problems by means of the proposed new article 11 *bis* (*ibid.*, para. 122), a number of questions still remained. The matter would perhaps be resolved if the proposed addition to paragraph 1 (*b*) (iii) of the new article 2 (see para. 27 *in fine* above) were adopted. Article 11 *bis* covered only the exceptional case in which an enterprise acted on behalf of the State, and did not cover—or even excluded—the typical case in which an enterprise acted on its own behalf and claimed no immunity at all. The proposal with regard to article 2, therefore, would not be rendered superfluous by article 11 *bis*. The texts proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (2117th meeting, para. 1) seemed to pave the way for a similar solution. In view of the concept underlying the draft, the question of segregated State property should be dealt with not in part III but in part I, the basic idea being to prevent any unnecessary broadening of the notion of the State. That applied both to the invoking of immunity and to the denial of respect for juridically independent parts of a State's property.

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[8] See *Yearbook . . . 1988*, vol. II (Part Two), p. 100, para. 508.

[9] *Yearbook . . . 1982*, vol. II (Part One), p. 229, document A/CN.4/357, para. 121.

34. Provisions on labour-law disputes, as envisaged in article 12, were unnecessary, since such disputes were normally settled by mutual agreement or insurance coverage. He did not understand, however, why the Special Rapporteur had agreed to delete paragraph 2 (*b*): a foreign State could not, for example, be compelled by the State of the forum to employ a particular individual. Article 12 would therefore have to be reconsidered.

35. Article 13, too, was open to serious objections, as could be seen from the comments made by several States. It seemed to prejudge questions of international responsibility that fell outside the scope of immunity. Whenever States accepted a waiver of immunity, they usually did so in a specific agreement. Cases in point were article 31 of the 1969 Convention on Special Missions and article 43 of the 1963 Vienna Convention on Consular Relations. The present wording of article 13 seemed to be unacceptable to many States, and it conflicted with article 31 of the 1961 Vienna Convention on Diplomatic Relations because it implied a general waiver of immunity. Such a far-reaching restriction of immunity was hitherto unknown in State practice. If, however, as the Special Rapporteur suggested in his second report (A/CN.4/422 and Add.1, para. 22), the application of the provision could be narrowed down to traffic accidents for which insurance coverage would normally be sought, States might be prepared to accept such an approach, which was more in line with article 31 of the Convention on Special Missions and article 43 of the 1963 Vienna Convention.

36. The form of language used in article 14 could be made much clearer if paragraph 1 (*a*) alone were retained. The reference to immovable property would then denote unambiguously the requisite juridical link between the forum State and the property concerned.

37. Article 18 gave rise to questions similar to those he had discussed in connection with article 2. The problems largely stemmed from the fact that the terms "owned" and "operated" were treated as equivalents. If, in the case of government ships engaged in commercial service, it was left to the plaintiff to decide whether to take action against the State owning the ship or against the company operating the vessel, that was only because no account was taken of the fact that a shipping company was a juridically independent entity and acted as the sole operator of its ships. In the German Democratic Republic, shipping companies were nationally owned enterprises having their own legal personality. They, and not the State, were the "operator". They were liable to the extent of their assets and acted in their own name, and an action could be brought by or against them. Hence they could not invoke immunity. A subsidiary liability of the State, as might be conceivable under article 18 due to a parallel reference to the "owner", was not acceptable.

38. The problem was not to ensure an advantage for States which had a large sector of State property, but to protect them against discrimination and to prevent them from being disadvantaged inasmuch as they could be held liable for the obligations of enterprises of theirs which none the less were separate legal entities and had no right to claim immunity. Something in the guise of immunity actually affected sovereign equality and came close to intervention in the internal legal order of a foreign State. It was a matter of general international law, not a problem peculiar to socialist States. Socialist States respected legal entities based in foreign legal systems and expected the same respect to be accorded to legal entities established under their legal systems. The Special Rapporteur was right to assume (*ibid.*, para. 24) that there was no reason to hold a State, as the owner of a ship, responsible if it allowed the separate operator, the shipping company, to answer a claim arising out of the operation of the ship. The solution would be to rely on the operator and not on the owner: that would be an easier way to reach the same result as that proposed by the Special Rapporteur in the new paragraph 1 *bis* of article 18 (*ibid.*, para. 26).

39. The main problem with article 19 lay not in the choice between the expressions "commercial contract" and "civil or commercial matter" but in the more complicated question whether the conclusion of an arbitration agreement could always be seen as a waiver of immunity in respect of disputes about the agreement or about the validity of the arbitration award. He agreed that the waiver of immunity which might be implied in an arbitration agreement could not be interpreted as implying, at the same time, a waiver of immunity from execution.

40. With regard to article 20, cases of nationalization were not exceptions to State immunity. On the contrary, they were, as a rule, sovereign acts of a State which were not subject to review by foreign courts. Even though the article was formulated merely as a safeguard clause, it did not exclude an interpretation which would impair the discretion of peoples to determine their political status and to pursue their economic, social and cultural development without external interference. The example given by the Special Rapporteur (*ibid.*, para. 41) did not alter that position. Indeed, it demonstrated the extent to which problems of self-determination and intervention were involved in such cases. The survival in a foreign country of a legal entity which had been legally dissolved in the State of origin signified far-reaching interference in the legal system of the country that had, for whatever reasons, decided to dissolve that entity. He continued to believe firmly that article 20 should be deleted.

41. It would be preferable to have a general provision rather than exceptions at the beginning of part IV of the draft, as in part II, and it would be more in line with modern law if article 21 were to refer generally to immunity from measures of constraint. On the other hand, there could well be a provision obligating States to follow final court decisions passed against them on the basis of the future convention. Since the 1972 European Convention on State Immunity already contained a similar provision, it should be possible to find a solution that would endorse the internationally recognized prohibition of execution against the property of other States. One conceivable arrangement might also be a provision based on reciprocity, or an introductory phrase, "Unless otherwise agreed . . . ", as proposed by the Special Rapporteur (*ibid.*, para. 46). But he could not agree to the proposal to eliminate in subparagraph (*a*) the link between the property in question and the proceedings. In view of the practice followed by a few countries *vis-à-vis* socialist countries, there would be a danger that the property structure of socialist States would be disregarded and that execution would be levied against any parts of their property. It was not very realistic to imagine that a State would agree to leave it to a creditor to decide,

in disregard of the country's statutory property structure, from which parts of property he wished to satisfy his claim or claims. If the aim was to prevent a defendant from evading his obligations by abuse of the law, then other solutions would have to be found. Indiscriminate execution against any property assets of a State did not seem to be an approach likely to command consensus.

42. As to article 24, he endorsed the suggestion made by several States to establish some order regarding service of process: there was no reason why it should not be done exclusively through diplomatic channels, which were available even if no diplomatic relations were maintained. Service of process through diplomatic channels would guarantee in every case that the foreign ministries of the States concerned were notified of action pending and could take appropriate steps within their own countries to bring about an extrajudicial settlement of a dispute by mutual agreement that would meet the concerns of all sides. As to the reliability of transmittal by post, personal experience showed that some doubt was justified.

43. He was not quite sure about the actual outcome of the modification of article 25, but it would be useful if the comments made by States on default judgments were duly taken into account, regardless of how such judgments were transmitted. Documents should not simply be assumed to have been received.

44. The title of article 28 did not entirely correspond to its content. The actual point was not non-discrimination, but the legalization of State practice that diverged from the rules of the future convention. That, however, would call into question the purpose of codification and would justify unilateral and divergent regulations. Article 28 was not needed to cover agreed or reciprocal extensions or limitations of immunity. States were always free to make such arrangements, as could be seen from the fact that almost all exceptions began with the phrase "Unless otherwise agreed . . .". It therefore seemed that the article could be dispensed with.

45. Mr. McCAFFREY said that Mr. Bennouna's suggestion concerning periodic review and revision of the future convention merited serious consideration. It was clear that the draft was still taking shape and intensive discussion was still required both in the Commission and in the Drafting Committee.

46. The remarks made by Mr. Tomuschat (2119th meeting) had covered most of the points he himself had wished to raise about articles 12 and 13. Article 12 was necessary. State practice in the matter did exist: while the United States *Foreign Sovereign Immunities Act of 1976* did not have separate provisions on contracts of employment, such contracts were included in the Act's commercial activities exception clause. Contracts of employment were an exception recognized in the legislation of several countries, in the 1972 European Convention on State Immunity and in the decisional law of a number of States.

47. Mr. Tomuschat had adverted to a case involving a radio and telegraph operator, and he, too, knew of a similar case. It had involved a Swiss switchboard operator who had worked at the United States Mission in Geneva for some 20 years, but who, owing to changes in working conditions and work requirements, had decided that she did not wish to remain in the Mission's employ. Upon leaving, she had contended that she was entitled to certain separation benefits. They had been denied, and the subsequent dispute had ended up in the Swiss courts, which had found that the United States could not invoke immunity. In making its decision, the court had actually referred to the proceedings of the Commission and to statements by some of its members.

48. He wished to re-emphasize Mr. Tomuschat's point that diplomatic protection was in effect unavailable in such cases: the same was true for cases arising under article 13. For example, the case now before the ICJ involving the requisitioning of an Italian-based subsidiary of a United States company had originated in the 1960s and had been winding its way through the Italian courts ever since. Exhaustion of local remedies had been required, there had been the inevitable bureaucratic delays, and so forth. The claim, which was worth millions of dollars, had thus taken 20 years to be espoused. Normal contract-of-employment claims and tort claims under article 13 were certainly not of such magnitude and in all likelihood would simply not be espoused. Individuals who were aggrieved by the actions of States must, as a matter of international human rights law, have some effective recourse available to them.

49. The Special Rapporteur had proposed deleting the second territorial requirement under article 13, but the best course would be to retain it, otherwise the door might be opened to a profusion of transfrontier tort cases. As a matter of fact, the non-commercial tort exceptions to the United States *Foreign Sovereign Immunities Act of 1976* had given rise to a number of suits for recovery for injuries resulting from transfrontier torts, notwithstanding the requirement in the Act that the injury or damage must occur in the United States, and despite the statement in the legislative history of the Act that the tortious act or omission must also occur in the United States.

50. The Special Rapporteur had remarked in his oral introduction (2114th meeting) that *Letelier* v. *Republic of Chile* (1980) appeared to be an exceptional case, but that was not true. Such suits might not be as numerous as those arising out of the commercial activities exception, but they did exist, and they caused problems with respect to the defendant State. In the past five or six years, at least two cases concerning Argentina had been brought in the United States: the *Siderman* case, involving alleged confiscation of property and human rights violations in Argentina, and the *Amerada Hess* case, concerning a vessel that had strayed too close to the war zone during the Falklands (Malvinas) conflict and had been bombed. In the latter case, the bomb had not exploded, but had remained in the hold, and it had been necessary to scuttle the ship. There had been cases involving Mexico as well—one arising out of an oil spill in the Gulf of Mexico which had damaged the Texas shoreline, and another in which a wrongful death suit had been brought against Mexico for alleged negligence in the transport of prisoners in the context of a prisoner-exchange treaty.

51. In a number of cases, the defendant Government had defaulted. As other members of the Commission had pointed out, making an appearance in a proceeding involved expenditure to retain an attorney, etc. But default also had its dangers: the damages awarded had often been in millions of dollars. Some countries, after encouragement from the United States Department of State, had entered an

appearance to request that the default judgment be reopened and had succeeded in having it overturned. The entire problem led him to believe that the Commission should consider specifically stating, perhaps in article 25 or in the commentary thereto, that the court must *ex officio* determine that the relevant provisions had been complied with prior to rendering a judgment. That would obviate the situation that frequently arose in the common-law system, where the mere presentation of a brief by a plaintiff, and failure of the defendant to submit one, were enough to decide a case in favour of the plaintiff.

52. In his second report (A/CN.4/422 and Add.1, para. 21), the Special Rapporteur quoted the commentary to article 13 (formerly article 14), which stated (para. (2)): "This exception to the rule of immunity is applicable only to cases or circumstances in which the State concerned would have been liable under the *lex loci delicti commissi*. . . ." That was true to a certain extent, but there had been something of a revolution in private international law whereby it was no longer possible to assume that the law of the place where the harm had been committed would be applied. In the United States, many states used interest analysis or the most significant relationship approach to determine the applicable law. In Europe as well, the *lex loci* rule did not apply strictly to all tort cases. The statement he had just cited should be interpreted to mean that the *lex loci delicti commissi* included the rules of the forum State on the choice of law; it should not be construed as referring only to the local law of the forum State.

53. The Special Rapporteur had perhaps raised the possibility of confining article 13 to traffic accidents because awards of very high damages, especially in the United States, were a major source of irritation. It was a commendable effort to address the problem, but it did not do enough to give an aggrieved individual meaningful recourse, and the Commission should give further consideration to the matter. The advantage of confining the article's application to traffic accidents was that it was possible to incorporate the requirement that the individual be insured, and the insurance would then cover the liability.

54. The Special Rapporteur's proposal for a new paragraph 2 of article 13 (A/CN.4/415, para. 143), to preserve the rules concerning State responsibility, was unnecessary. No problems along those lines had arisen in State practice; nevertheless, the question might be looked into in a subsequent report.

55. Article 14 should indeed be simplified. It had rightly been pointed out that the article took too much account of the common-law system and its peculiar ways of referring to property. The Special Rapporteur's recommendations for streamlining paragraph 1 (*c*) to (*e*) (*ibid.*, paras. 152-154) were constructive. Yet the problems dealt with in those subparagraphs were practical ones and should not be entirely ignored. The fact that a State claimed to have an interest in a property, perhaps because, under its law, real property reverted to it, should not prevent a court from continuing with a proceeding and determining the rights and interests of individuals over property or assets. As for paragraph 2, he shared the view that the Commission should consider reformulating or deleting it.

56. Articles 15 to 17 were, he was convinced, essential components of the draft. As to article 18, the term "non-governmental" should be deleted, otherwise it would imply that State vessels were immune if used for commercial government service. Mr. Mahiou (2119th meeting) and other members had suggested that new formulations should be sought. Mr. Roucounas had drawn attention to the terms used in the 1982 United Nations Convention on the Law of the Sea. Personally, however, he believed that a reference to "commercial purposes" would suffice.

57. With regard to the proposed new paragraph 1 *bis* of article 18 (A/CN.4/422 and Add.1, para. 26), it did not seem necessary to provide specifically for a particular system. In that connection, his remarks on the proposed new article 11 *bis* (2117th meeting) could be applied to paragraph 1 *bis* of article 18 as well. He agreed that there was no need to cover State aircraft in the draft, but he could not concur with the Special Rapporteur's statement (A/CN.4/422 and Add.1, para. 31) that there was no uniform rule of customary international law concerning the immunity of State-owned or State-operated aircraft. One could indeed discern that a rule had emerged in that area: it was closely related to those in the relevant conventions and analogous to rules governing State vessels.

58. Article 19 was extremely important in view of the increasing use of arbitral clauses in contracts between States and State entities on the one hand, and individuals on the other. As noted in the commentary to the article (formerly article 20)[10] and pointed out by members, it dealt with supervisory jurisdiction over arbitration proceedings. The necessity of such an article had been illustrated by the *Pyramids* case, referred to by Mr. Mahiou and Mr. Reuter. Moreover, it was essential for the article to spell out quite clearly that State immunity could not be invoked in a proceeding to enforce an arbitration agreement.

59. On the question whether article 19 should refer to recognition and enforcement of arbitral awards, the previous Special Rapporteur had taken the view that all questions of recognition and enforcement would come under part IV of the draft, and that part III would deal only with immunity, or lack of immunity, from jurisdiction. Since article 21 spoke of "any" measures of execution, it presumably covered measures of execution or enforcement of arbitral awards. But the Commission might wish to address the question more directly and expressly provide for recognition and enforcement of arbitral awards somewhere in the draft, perhaps in article 19 or article 21. Some countries, including the United Kingdom and the United States, did not require a connection between the property against which enforcement was sought and the cause of the action or object of the claim in enforcing arbitral awards. That practice was in line with the Special Rapporteur's thinking about deleting the requirement in article 21 (*a*) that the property should have a connection with the object of the claim.

60. Concerning the expressions in square brackets in article 19, he greatly preferred "civil or commercial matter" to "commercial contract". There was no reason to narrow down the situations in which the court could exercise supervisory jurisdiction. After all, the State had agreed to arbitration, and that agreement should not be illusory: it should be binding on and enforceable by both parties to the agreement.

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[10] *Yearbook . . . 1985*, vol. II (Part Two), pp. 63-64.

61. Lastly, article 20 on nationalization was not strictly necessary. If it was to be kept, however, it should be moved to part V of the draft.

62. In his opinion, the Commission should reserve time at the next session for careful consideration of articles 11 to 20, as well as of parts IV and V of the draft, especially in view of the many important suggestions for amendments made by the Special Rapporteur and by Governments.

63. Prince AJIBOLA congratulated the Special Rapporteur on his brilliant introduction of his reports on a most difficult topic.

64. Paradoxically, he shared the view of members who had called for a cautious approach to the topic and of those who had urged that the Commission's work be speeded up. The topic was one of great importance in international relations, with regard to various types of transactions. The subject should therefore be approached with prudence. Yet the present position was that many countries objected to the actions of certain forum States which undermined their sovereignty. The well-established rule of international law, *par in parem imperium non habet*, was being disregarded by those forum States and the ships of other States were being attached, the accounts of their central banks or national banks were being frozen with impunity and execution was being levied against their assets, including buildings and aircraft. For all those reasons, a definite conclusion must be reached on the topic before the situation degenerated any further. In short, the Commission should make haste slowly, so as to ensure that the final draft stood the maximum chance of commanding general approval by States.

65. The principle of the jurisdictional immunity of States and their property was universally accepted and recognized in international law. It flowed logically from the sovereignty, and the sovereign equality, of States. As so aptly stated by the Government of Bulgaria in its comments and observations, those principles provided for the "non-submission of one State to the jurisdictional authority of another" (A/CN.4/410 and Add.1-5).

66. He did not concur that there were two schools of thought regarding the jurisdictional immunity of States, namely an absolute theory and a restrictive theory of immunity. The truth of the matter was that there existed only one principle. Of course, every rule had some exceptions to it, and the so-called restrictive or functional postulate constituted a mere expression of possible and practical exceptions to the principle of immunity which had emerged in the recent past. As pointed out by the Government of the German Democratic Republic, the Commission's task was "to work out a set of rules which, taking into account the legitimate interests of all States, will put an end to what has been an increasing number of attempts in the last few years to minimize the immunity of States and their property through unilateral acts" (*ibid.*). Hence the true position was that unilateral acts by certain States were in fact negating the rules of international law on State immunity to the detriment of some of the world's poorer countries, especially those of the third world. The restrictive or functional theory was being propagated and encouraged by a few, mostly industrialized, countries, and as a consequence the sovereignty of third-world States was being rendered purely nominal.

67. As already pointed out, only a few States had submitted comments on the draft articles. Such a small number of replies could not be regarded as a consensus of opinion on the part of the Members of the United Nations. It should also be borne in mind that a number of the States which had replied had expressed views clouded by the provisions of the 1972 European Convention on State Immunity. It was essential to remember that the draft articles now under discussion were much greater in dimension than the 1972 European Convention.

68. He was certainly not oblivious to the question of *acta jure gestionis*, but unfortunately it was *acta jure imperii* that were being marginalized, and in some cases one wondered whether anything was left of them. His own country had recently been the victim of such a situation. In the early 1970s, after the civil war, the needs of national reconstruction and rehabilitation had led the Nigerian State to purchase large quantities of cement, purchases which had been treated as *acta jure gestionis*. Consequently, the country's assets had been attached in many parts of the world and the adverse effects were still being felt. A typical example in that connection was provided by *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* (1977), a case in the United Kingdom to which reference had already been made during the discussion. That issue would arise also in connection with the question of commercial contracts. By and large, all States recognized the jurisdictional immunity of foreign States and their property, with exceptions in only a very few instances—exceptions which could not be extended unilaterally or subjectively. He therefore welcomed the fact that the Special Rapporteur had never allowed restrictive theories to override or confuse his conceptualization of the aim and object of the present topic, and had adopted a pragmatic and realistic approach.

69. Article 1 was acceptable in substance, but he agreed with the proposal by Australia to clarify the text by replacing the words "a State" and "another State" by "a forum State" and "a foreign State", respectively. His own suggestion would be to reword the article along the following lines:

> "The present articles apply to the immunity of one State and its property (referred to herein as the 'foreign State') from the jurisdiction of the courts of another State (referred to herein as the 'forum State')."

That clarification, made from the outset in article 1, would remove all the uncertainties and ambiguities in other articles, such as articles 6, 7 and 11.

70. The Special Rapporteur's proposal to merge articles 2 and 3 in a single new article 2 entitled "Use of terms" (A/CN.4/415, para. 29) was acceptable. The definition of the term "court" in paragraph 1 (*a*) was wide enough to include all State judicial organs and conferred very wide jurisdiction. It could, however, be interpreted to include both the civil and the criminal jurisdiction of courts. His suggestion would be to confine the provision to civil cases only. Accordingly, the words "entitled to exercise judicial functions" should be amended to read: "entitled to exercise judicial functions in civil matters". That proposal was in line with the comment made by the German Democratic Republic (A/CN.4/410 and Add.1-5) that the definition of the term "court" should include a precise explanation of the expression "judicial functions".

71. As to the definition of a "commercial contract", there had not been any comments on the "nature" criterion, but objections had been raised to the "purpose" test. In his own view, both criteria should be retained. In the example he had cited earlier of the purchase of cement, the purpose of the purchase had not been commercial but had related to the welfare of the State, in other words it had been a purpose connected with the public interest. There was an entity in his country which purchased commodities from abroad and was in part commercially motivated, namely the Nigerian National Supply Company Limited. He therefore endorsed the comments made by Mexico and Spain (*ibid.*) on paragraph 1 (*b*) of the adopted article 2 and paragraph 2 of article 3, respectively, as well as the Special Rapporteur's recommendation to retain the provision now contained in paragraph 3 of the new article 2. Similarly, the Federal Republic of Germany had rightly said (*ibid.*) that the draft articles should make provision for federal States.

72. It had been suggested, by the United Kingdom among others, that specific reference should be made in article 4 to the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and other relevant treaties on diplomatic law. In that respect, he would point out that not all of those instruments had been ratified by all States. Actually, the 1961 and 1963 Conventions, as well as the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, made express provision for the jurisdictional immunity of diplomatic missions, consular posts, special missions, international organizations and international conferences. Generally speaking, however, he was satisfied with the wording proposed by the Special Rapporteur (A/CN.4/415, para. 50).

73. He also supported article 5, a provision on non-retroactivity which was customary in drafts of the present type. Nevertheless, the Government of Mexico had pointed out that some of the articles should apply retroactively because they set forth current principles of international law.

74. Article 6 was a core provision of the whole draft. The words "and the relevant rules of general international law", between square brackets, should be deleted. He was opposed to any suggestion that the draft should be made subordinate to the "general rules of international law", something which could open the door to restrictions on the principle of State immunity. Under its statute, the Commission was called upon to work on the progressive development and codification of international law. In the work in hand, care should be taken not to weaken all of the draft articles by making them subject to the principles of general international law.

75. The Special Rapporteur's reformulation of paragraph 1 of article 7 (*ibid.*, para. 79) removed the ambiguities in the adopted text. Paragraphs 2 and 3 should be transferred to the article on the use of terms, as should the provisions of article 11. As for the title of part III of the draft, it should be "Exceptions to State immunity", not "Limitations on State immunity".

76. Lastly, he had an open mind on the proposed new article 11 *bis* (*ibid.*, para. 122), for the same reasons as those given by Mr. Al-Baharna (2118th and 2119th meetings).

77. The CHAIRMAN, in reply to a question by Mr. BARSEGOV, said that articles 12 to 28 would be discussed at the next session.

The meeting rose at 1.05 p.m.

2121st MEETING

Tuesday, 20 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*concluded*)* (A/CN.4/384,[1] A/CN.4/413,[2] A/CN.4/423,[3] A/CN.4/L.431, sect. B)[4]

[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

Articles 1 to 17[5] (*concluded*)

1. Mr. BARBOZA (Special Rapporteur), summing up the debate and replying to Mr. Reuter's question (2110th meeting), "What's it all about?", said that, first, it was about fulfilling the Commission's mandate from the General Assembly: to prepare draft articles on international liability for the injurious consequences of acts not prohibited by

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* Resumed from the 2114th meeting.

[1] Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

[5] For the texts, see 2108th meeting, para. 1.

international law. Secondly, it was about trying to get out of the present situation, which Mr. Ushakov had described in 1982 as follows:

> . . . There was, indeed, no general rule of international law that imposed a duty on a State to indemnify its nationals, another State or the nationals of that other State for injury suffered as the result of an activity not prohibited by international law which it had carried out. . . .[6]

That comment might have reflected the law and the feeling of jurists at the time, but it sounded prehistoric now.

2. With regard to his own idea of the future convention and its role, he pointed out that there was a series of conventions and rules regulating specific activities or the zones in which such activities took place, including the 1985 Vienna Convention for the Protection of the Ozone Layer,[7] the 1979 Convention on Long-range Transboundary Air Pollution[8] and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.[9] The principles on which those instruments had been based had never been explicitly stated, however, and the problem of responsibility was merely touched on in the texts. For example, the Basel Convention provided for the signature of a protocol (art. 12); the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities[10] contained rules on the liability of the operator (strict liability) and, subsidiarily, of the State of which the operator was a national and also provided for a protocol; the 1985 Vienna Convention stated no principles and its protocols did not mention responsibility; and the 1979 Convention expressly declined to deal with responsibility. Those lacunae had to be filled by means of a very general convention establishing general principles and a procedure that would apply to all the activities covered by draft article 1, in so far as the provisions of that article were not incompatible with those of specific conventions or protocols. Such conventions and protocols might deal with specific activities or with the same activities that were covered in article 1, but they would incorporate more detailed rules and have a more limited territorial scope. That would certainly be the case if such an instrument contained a list of activities to which the framework convention under consideration applied. The procedural stage required for the determination of the nature of an activity could then be eliminated: if an activity appeared in the list, it would come under article 1 and a specific régime would have to be found for it.

3. As to future work on the topic, he planned first to draft a chapter containing guidelines for negotiation and elaborating on the concept of compensation as a means of redressing the balance of interests, bearing in mind the costs-allocation theory. He also planned, as he had said (2108th meeting) in introducing his fifth report (A/CN.4/423), to deal with cases of widespread risk or harm, which required a different procedure because several not clearly identifiable affected States would then have to be notified by States of origin which themselves were not easily identifiable and because the participation of international organizations, the possible interests of the international community and similar matters had to be taken into account.

4. In addition, he planned to go into the question of responsibility for activities which caused harm to the "global commons" and to report thereon to the Commission. Obviously, that subject would bring into play very similar principles of responsibility; obligations of prevention, and possibly compensation, would have to be provided for. Implementation machinery might have to be adapted, since, in such cases, the "public order" of the international community would be affected and the harm would be done to zones belonging to no State in particular. Consequently, the role of the "affected State" would have to be played by an entity that was not directly affected—for example, an international entity or States acting as custodians of the community's public interest. That question was, *prima facie*, part of the topic, for it related to liability for injurious consequences, in the "global commons", of activities not prohibited by international law. It was by no means a matter of "environmental law" alone.

5. Summing up the debate itself, he said he believed that the revised draft articles 1 to 9, together with the comments on them in his report and the observations made during the discussion, could be referred to the Drafting Committee. However, he was not proposing that the new draft articles 10 to 17 be referred to the Drafting Committee, since they were of an exploratory nature. He would comment, in connection with both sets of articles, only on some of the main points that had been raised, leaving aside—though taking good note of—the wealth of comments of a purely drafting nature.

6. He had introduced the concept of risk in his fourth report (A/CN.4/413) because a criterion had been needed to limit the scope of the draft articles. In other words, harm triggered compensation, but compensation was due only if harm had originated in an activity involving risk. Prevention, however, was based on the concept of "appreciable risk". Since many members of the Commission and many representatives in the Sixth Committee of the General Assembly had reacted strongly against the role thus attributed to the concept of risk, he had broadened the scope of the draft in his fifth report by including activities involving risk that might cause harm, as well as activities that actually did cause harm. Harm thus continued to trigger compensation, but it might originate either in activities involving risk or in activities having harmful effects. Prevention was based on the concept of "appreciable risk" in the case of activities involving risk, and on the certainty or foreseeability of harm in the case of activities having harmful effects.

7. At the present session, only one member of the Commission had defended the concept of risk as a criterion for limiting the scope of the draft. The opposite position had been adopted enthusiastically by a great many members and with some reservations by other members, who would like separate consideration to be given to certain aspects of the activities referred to in article 1 or wanted the scope to be better defined by means of other forms of limitation, such as a list of activities.

8. Some of those who did not accept limitation by risk would prefer the scope to be even broader and to include isolated acts—acts not linked to any activity. One member

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[6] *Yearbook . . . 1982*, vol. I, p. 249, 1739th meeting, para. 47.

[7] UNEP, Nairobi, 1985.

[8] See 2109th meeting, footnote 12.

[9] See 2112th meeting, footnote 6.

[10] See 2111th meeting, footnote 14.

had said that periodic acts should be included. In fact, however, they were already included in the two types of activities in question, for nowhere was it said that acts constituting an activity had to be continuous.

9. He took it that the Commission wished him to go on exploring the enlarged approach to the question of scope, but Mr. Barsegov's position (2113th meeting) deserved comment.

10. Mr. Barsegov found that the inclusion in the draft articles of activities having harmful transboundary effects was not logical, since such activities could hardly be considered lawful. That was true on the plane of principles, and the principles deriving from the *Corfu Channel*[11] and *Trail Smelter*[12] cases were indeed based on the premise that a State had no right knowingly to use or to permit the use of its territory to cause harm in the territory of another State. In real life, however, there were two obvious derogations from that principle. The first was that, according to the threshold concept, the affected State had to accept harm if it was neither appreciable nor significant. The second was that, in the case of specific activities, there had to be a special prohibition in order for the basic principles to function smoothly, as illustrated by the activities of energy-producing or chemical industries, or the case of exhaust gases of automobiles or emissions from domestic heating appliances, etc. If such a prohibition did not exist, it was doubtful that international law would grant any right of action, so that, in practice, there was no such general prohibition. Those transboundary effects had somehow crept into lawfulness, however, and it would now be almost unthinkable to treat them as wrongful. If the problem raised by such activities was to be solved, each one would require agreement on a special régime that would be applicable to them in addition to the general régime to be established by the instrument the Commission was elaborating.

11. With regard to the concept of "conditional fault", whose inclusion in the report (A/CN.4/423, paras. 5-7) Mr. McCaffrey (2109th meeting) and Mr. Al-Khasawneh (2114th meeting) had objected to and in connection with which Mr. Thiam (2113th meeting) had identified a confession that the topic was part of responsibility for wrongfulness, he said that his intention had not been to introduce any theory of fault: he had only tried to show the mental process which was used in many legal systems to determine who was responsible whenever harm had occurred. He had used the expression "original sin" precisely in order not to refer to "fault".

12. Some speakers, such as Mr. McCaffrey, Mr. Hayes (2109th meeting), Mr. Shi (2110th meeting) and Mr. Njenga (2112th meeting), had expressed a preference for the word "activities" rather than "acts" and the great majority of members had not opposed the choice of the word "activities". Mr. Calero Rodrigues (*ibid.*), Mr. Al-Khasawneh and perhaps Mr. Francis (2111th meeting) would like isolated acts also to give rise to liability.

13. A number of suggestions had been made with regard to the terms "jurisdiction" and "control". Mr. McCaffrey preferred the expression "effective control" and Mr. Bennouna (2112th meeting) objected to the inclusion in draft article 1 of the words "in the absence of such jurisdiction, under its control" because jurisdiction and control could be cumulative. Mr. Roucounas (*ibid.*) and Mr. Francis thought that the expression "jurisdiction and control" would suffice, while Mr. Razafindralambo (2113th meeting) preferred "jurisdiction and effective control". Mr. Graefrath (2111th meeting) wanted a definition of jurisdiction that was wider than the one based exclusively on territoriality. In reply to all those members, he said that the convention under preparation was not a convention on jurisdiction, that the use of such terms in other conventions had not given rise to problems and that the Drafting Committee now had enough material to find satisfactory wording.

14. As to the dual applicability of the régimes of causal liability and responsibility for wrongfulness, he agreed with Mr. McCaffrey that their coexistence would depend on the way the primary rule was formulated. In his opinion, however, both of the examples given by Mr. McCaffrey (2109th meeting, para. 21) related to responsibility for wrongfulness. Whether the primary rule was that "State A shall exercise due diligence to prevent harm to State B" or that "State A shall ensure that no harm is caused to State B", there was a prohibition on causing harm. The primary rule in causal liability should in fact be expressed as follows: "State A may cause a certain amount of harm to State B, provided that it pays compensation for the harm."

15. In reply to a comment made by Mr. Calero Rodrigues, he referred to the conclusions set out in his report (A/CN.4/423, para. 47): if two States were signatories to both the future convention on the law of the non-navigational uses of international watercourses and the future convention on international liability, and if draft article 16 [17], on pollution, of the articles on watercourses[13] remained in its present form, then, in accordance with draft article 4 under consideration, "the present articles shall apply subject to that other international agreement". Thus, in cases of appreciable harm caused by watercourse pollution, the prohibition provided for in the watercourses convention would apply if the harm resulted from the normal conduct of the activity in question. If it was the result of an accident, it would be the convention on international liability that applied.

16. On the subject of reparation, he did not agree with Mr. Tomuschat (2110th meeting) that draft article 9 established a set of secondary rules. In his view, the obligations in question were primary ones. The primary rule could be formulated more or less as follows: "Your activity will be permitted if the harm it causes is compensated for." The secondary rule came into effect only if reparation was not made, i.e. if the primary obligation to make reparation was violated.

17. Mr. McCaffrey, Mr. Reuter, Mr. Al-Qaysi, Mr. Eiriksson, Mr. Francis, Mr. Yankov, Mr. Díaz González and Mr. Al-Khasawneh preferred the word "compensation" to "reparation". In his fourth report (A/CN.4/413), the word "compensation" had been interpreted as referring almost exclusively to monetary payments and that was why he had subsequently used the term "reparation", which might partly take the form of some action by the State of origin

[11] See 2108th meeting, footnote 10.

[12] *Ibid.*, footnote 9.

[13] *Yearbook . . . 1988*, vol. II (Part Two), p. 26, footnote 73.

to help eliminate or alleviate the consequences of the injury to the affected State, for example if it possessed appropriate technology which the affected State did not have. But the members he had just named preferred the word "compensation" because, in a field completely different from that of responsibility for wrongfulness, it was appropriate to use different terms. He was very satisfied with that reflection, because it showed that most members of the Commission now agreed that causal liability was entirely different from responsibility for wrongfulness, which had not been the case two years previously. Only Mr. Solari Tudela (2112th meeting) continued to prefer the word "reparation", which he believed had the merit of recalling that the present topic had originated in the consideration of the topic of State responsibility.

18. The substance of the concept of reparation or compensation, meaning the redress of the balance of interests involved, had, however, not given rise to any major objections—quite the contrary. Mr. Bennouna wanted equity to be mentioned, but equity was an amorphous concept. The concept of the balance of interests would be explained in detail later, as he had indicated in his fourth report (A/CN.4/413, para. 49), and in accordance with sections 6 and 7 of the schematic outline. The question whether what was involved was a "redress" or a "readjustment" of that balance, a point raised by Mr. Bennouna and Mr. Al-Qaysi (2112th meeting), would also be discussed later.

19. Some speakers, including Mr. Hayes and Mr. Bennouna, had insisted that draft article 2, on the use of terms, must be provisional, since some terms would have to be redefined and new ones might have to be included. Others—Mr. Yankov (2113th meeting), Mr. Roucounas and Mr. McCaffrey—had found some of the terms used, and particularly the word "places", unusual. Yet that word was used to convey precisely the same meaning in the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water,[14] article I, paragraph 1, of which referred to "any place under its jurisdiction or control".

20. Some members of the Commission, such as Mr. Barsegov and Mr. Reuter, were opposed to the use of the expression "innocent victim", while others—Mr. Hayes, Mr. Pawlak (2111th meeting) and Mr. Eiriksson (2112th meeting)—had endorsed it. The Drafting Committee would no doubt find a satisfactory solution.

21. With regard to obligations of prevention, Mr. Shi, Mr. Bennouna and Mr. Solari Tudela had said that they would prefer the violation of procedural obligations and possibly also of obligations of prevention by a State not to engage its responsibility for wrongfulness. Mr. Francis had said that no machinery should be set in motion before the obligation to make reparation had been violated, in accordance with the solution adopted by the previous Special Rapporteur in the schematic outline. Actually, that was one of the solutions he himself offered the Commission both in his fourth report and in his fifth report (A/CN.4/423, paras. 48-49 and 68) and it had not met with any express opposition. It could be introduced in the draft through an article stating that non-compliance with the obligations embodied in the corresponding articles would give no right of action to the affected State; only the régime of the articles referring to compensation would then be applicable. He hoped that such a solution would satisfy Mr. Calero Rodrigues, who was opposed to "hard" obligations with regard to prevention.

22. Opinions were divided on the terms to be used to describe harm and risk. A considerable number of speakers, namely Mr. Ogiso (2110th meeting), Mr. Njenga, Mr. Al-Qaysi, Mr. Barsegov, Mr. Pawlak and Mr. Graefrath, had expressed a preference for the term "significant" rather than "appreciable" in the case of harm, and some of them had also wanted the term "significant" to be used in the case of risk. Mr. Njenga had said that risk should be discoverable by a "reasonable examination", while Mr. Al-Khasawneh had expressed a preference for the words "detectable risk". On the other hand, Mr. Hayes and possibly Mr. McCaffrey were in favour of the word "appreciable". The choice of terms was really of little consequence; the important thing was that there was no longer any question about the need for a threshold to define harm and risk.

23. In referring to draft article 4, Mr. Reuter, Mr. Tomuschat and Mr. Bennouna had drawn attention to the residual nature of the draft articles as a whole. Mr. Bennouna had said that article 4 should emphasize the pre-eminence of *lex specialis* even more clearly. He personally failed to see how the point could be made more clearly than it was in article 4, but if Mr. Bennouna had better wording to propose, the Drafting Committee would be grateful for it. Mr. Al-Baharna (2113th meeting), however, believed article 4 to be unnecessary, taking the view that the matter was already governed by paragraph 3 of article 30 (Application of successive treaties relating to the same subject-matter) of the 1969 Vienna Convention on the Law of Treaties.

24. Mr. Graefrath had said that the Commission could not maintain the presumption stated in paragraph 2 of draft article 3 without good reasons. Good or not, reasons in support of the presumption had been given in his fourth report (A/CN.4/413, paras. 62-70). He had acknowledged that the draft went "further in this respect than the *Corfu Channel* ruling", adding that "this is justified because of the nature of causal responsibility, which requires that the mechanisms of the draft should be more easily operative" (*ibid.*, para. 68).

25. The establishment of a requirement such as "the means of knowing" already imposed a restriction whose purpose was to take account of the situation of the developing countries. However, to place the burden of proof on the affected State, which might very well be another developing country, did not seem reasonable, particularly bearing in mind the dicta in the *Island of Palmas* case[15] and the *Corfu Channel* case, namely that the territorial sovereignty of the State of origin prevented the affected State from entering the territory of the State of origin in order to gather the necessary evidence, which was of necessity in the hands of that State. In the *Corfu Channel* case, the ICJ had stated that "the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of

[14] United Nations, *Treaty Series*, vol. 480, p. 43.

[15] United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 829 (arbitral award of 4 April 1928).

proof available to establish the knowledge of that State as to such events".[16] Since that case had been one of responsibility for wrongfulness, in which the attribution of an act to a State was of necessity more complicated, and since causal liability required a simple method of assignment of obligations, there appeared to be good reasons for retaining the presumption in draft article 3.

26. Mr. Yankov had emphasized the international aspects of co-operation and had suggested that the Commission might draw on article 197 of the 1982 United Nations Convention on the Law of the Sea. Draft article 7 was, however, worded along much the same lines as article 197. Perhaps a reference to "regional" co-operation should be added to bring the two articles more into line.

27. Mr. Barsegov had found it illogical that co-operation by the affected State with the State of origin should be limited to cases of "harm caused by an accident" (art. 7), arguing that the State of origin could also be innocent in the case of activities having harmful effects. However, in the latter case, the State of origin would, by definition, know that the activity in question produced such effects. Its innocence should therefore not be taken for granted and it would seem excessive to require the affected State to co-operate in the event of harm caused by the State of origin to its own population and territory.

28. The possibility of introducing the participation of international organizations into the topic had, in general, been well received by the Commission and he had taken good note of the useful suggestions made in that regard.

29. The new draft articles 10 to 17 had given rise to many comments, the clearest message being that the Commission wanted a more flexible procedure and that it had many doubts about the similarity with the proposed régime for the non-navigational uses of international watercourses. Although a new set of articles would probably replace draft articles 10 to 17 in his next report, he wished to take up some of the points raised.

30. There were three possible solutions: a detailed procedure such as that proposed in articles 10 to 17, with well-defined obligations and measures; a more flexible, less compulsory procedure; and no procedure at all. The last solution was quite logical and was based on the deterrent effect of reparation. It seemed to be the solution favoured by Mr. Calero Rodrigues, who had said that he wanted to avoid any time-limit for notification; the absence of a time-limit would, of course, preclude the possibility of any procedure of a more or less compulsory nature. There was, however, one major drawback: not to require the participation of the affected State—a consequence of the absence of any procedure—would impair prevention. With the emphasis which the General Assembly and the Commission itself had placed on prevention, it would not seem possible to leave it out completely. Accordingly, the best solution seemed to be a more flexible procedure than that which he had proposed.

31. Some members of the Commission had pointed out that articles 10 to 17 did not take account of the case of extended harm—for example, long-range pollution—of the risk of such harm or of harm to the "global commons". He would try to explore those areas in his next report.

32. Mr. Al-Qaysi and Mr. Graefrath had suggested that activities involving risk and activities having harmful effects should be dealt with separately. That suggestion was worth looking into, but several preliminary considerations would seem to militate in favour of only a partial separation of the articles dealing with each category. First, harm provoked by both types of activities had the same source: the State of origin. Secondly, the same assignment of obligations (art. 3) was valid in both cases. Thirdly, prevention was also applicable to activities having harmful effects in so far as it tended to keep the harm caused below the threshold of "appreciable" or "significant" harm. Fourthly, harm triggered liability in both cases. Fifthly, the affected States were affected in the same manner and, where any doubt existed as to who was affected, the same uncertainty existed for both types of activities. Sixthly, the same principles appeared to be applicable to activities involving risk and to those causing effective transboundary harm, namely freedom of action (art. 6), co-operation (art. 7), prevention (art. 8) and reparation (art. 9). Seventhly, the procedural obligations also did not seem to differ greatly in each case. The requirements with regard to assessment (art. 10) were identical, except that, in the case of activities involving risk, there also had to be an assessment of risk; and notification and information were applicable in both cases as well.

33. Mr. Al-Khasawneh took the view that the activities referred to in article 1 should not be initiated until the question of the applicable régime was settled. It seemed, however, that the majority of the members of the Commission accepted the solution proposed in the fifth report (A/CN.4/423, paras. 114-116).

34. Mr. Graefrath had made two points on the obligation to negotiate: first, that the obligation, as worded in draft article 16, was in fact an obligation to agree on a régime; and, secondly, that an obligation of consultation would be more in keeping with international practice. Mr. Bennouna thought that it would be unrealistic to oblige States to negotiate. Mr. Graefrath's first point was not in fact corroborated by international practice: an obligation to negotiate should not be confused with an obligation to reach agreement and was simply an obligation to sit at the negotiating table and negotiate in good faith with a view to reaching an agreement. That was what happened when a border line or fishing rights were negotiated. In the case under consideration, the object of the negotiations was a régime, because the conflict of interests to be resolved was permanent and the States concerned had to negotiate a régime extending in time. However, it might well be that consultations would be a better solution than negotiations when it came to establishing a régime. In the absence of agreement on a specific régime, the régime of the present articles would apply. However, reparation necessarily presupposed negotiations and, consequently, imposed an obligation to negotiate. He remained convinced that the obligation to negotiate was well established in international law. Reference to general international law might even be dispensed with if a specific article in the future convention imposed that obligation on the parties. The proposed solution would then not strictly depend on the soundness

[16] *I.C.J. Reports 1949*, p. 18.

of any one position with regard to the theoretical problem under discussion.

35. Mr. FRANCIS said that he was concerned about the relationship between the attribution of responsibility and negotiation. If State A refused to negotiate with State B, there had necessarily been a breach of an international obligation within the meaning of the draft articles. The Special Rapporteur's position on that point probably depended on what he thought about the non-attribution of responsibility before the point at which compensation was refused.

36. The question of the "global commons" was still outstanding. Should the Commission include it in the scope of the draft? The issue was a burning one, much more so than in 1982. Without prejudging the final decision, the Commission might consider that aspect of the topic. His own view was that a discussion should be held to determine what the concept covered.

37. Mr. Barsegov (2113th meeting), referring to a view once expressed by Mr. Ushakov, had recalled that, in the area under consideration, the law was non-existent. That comment by Mr. Ushakov was still true. The question of responsibility should therefore be left to a later stage, bearing in mind that the concept of wrongfulness did not enter into play in the present context. It was true that, if a State caused transboundary harm and deliberately pursued the activity which had caused it, it placed itself in a situation that was wrongful; but that was not the most common situation.

38. Mr. BARSEGOV said he had not recommended that the draft articles be referred to the Drafting Committee. He had so agreed only for the previous draft articles 1 to 10. However, the Special Rapporteur had proposed new texts which were based on entirely different foundations. He had asked the Special Rapporteur what his position was and, in particular, whether the earlier provisions, which were closer to Mr. Ushakov's ideas, were now out of date and, if so, in what way. The Special Rapporteur had replied that, in the absence of elements for codification, the aim was to develop international law.

39. Since the Commission had before it new texts based on completely new concepts, he intended to propose, at the time of the discussion of the report to the General Assembly, that the Sixth Committee be requested to consider whether that change served any purpose and whether the Commission should continue its work on the basis of "strict" or "absolute" liability for all transboundary harm resulting from a lawful activity, without taking account of the concept of risk.

40. It was still not clear precisely what activities were being discussed. The Special Rapporteur had spoken of motor vehicle traffic and domestic heating. Other activities that came to mind included the felling of trees in Siberia and Amazonia, and African agriculture, which was causing desertification. If those were the activities in question, that should be made clear to the Sixth Committee.

41. Mr. FRANCIS said he regretted the fact that the term "situations" was no longer used in draft article 1 and would welcome further explanations by the Special Rapporteur on that point.

42. With regard to the "global commons", he noted that article 1 referred to transboundary harm without indicating any precise limits: the scope of the draft could thus extend to those commons. In the circumstances, he proposed that the Commission, which appeared to agree on that point, should decide in principle to deal with the problem of the "global commons".

43. As Mr. Barsegov had once again stressed, article 1 was not yet ripe for consideration by the Drafting Committee. Since the activities involving risk referred to in that article could cause harm, risk did not have to be mentioned: it could very well be dealt with elsewhere, as another aspect of the topic.

44. Mr. BEESLEY said that it would be useful if the text of the Special Rapporteur's comments in summing up the debate could be circulated. He was concerned that the Commission was reopening an old debate, at the risk of going over arguments that had already been put forward, particularly on whether it should be codifying existing rules or working on the progressive development of international law. Rules in the matter did in fact exist and he was tired of quoting judicial decisions, treaties and conventions, not to mention Principle 21 of the Stockholm Declaration,[17] which had been adopted by consensus 17 years earlier and the concept of the "global commons", in connection with which ideas had been developed in the 1982 United Nations Convention on the Law of the Sea that, although recent, were not altogether new.

45. Trusting in the spirit of compromise of the members of the Commission, he had referred at the 2111th meeting (para. 68) to a book containing a very pertinent analysis of the meaning of the expressions "strict liability" and "absolute liability", which in his view were not coterminous.

46. There were many activities which were not wrongful under international law but which did cause harm and the courts had already had occasion in that regard to rule on a whole series of obligations, including that of reparation. State practice therefore existed and differences of opinion among members of the Commission must not prevent progress being made on the topic. The Commission had been entrusted with a specific mandate that would enable it to make a major contribution to the study of the question of the "global commons" and of the topic as a whole.

47. The question whether the draft articles should be referred to the Drafting Committee despite the reservations of some members was one of method. That had been done, for example, in the case of the draft Code of Crimes against the Peace and Security of Mankind. Unanimity among the members of the Commission could not be counted on, for it was so rare as to be miraculous.

48. The CHAIRMAN said that, if the Commission wished to reopen the debate on the scope of the topic, it would have to change its programme of work. The Special Rapporteur had in fact submitted revised draft articles to the Commission, thus giving members an additional opportunity to discuss the scope of the topic, but he could just as well have submitted those texts to the Drafting Committee. In any event, the Drafting Committee would sooner or later have to deal with the problem, even if the Commission reversed the decision it had taken at its

[17] See 2108th meeting, footnote 6.

previous session and did not refer the revised draft articles to it now. Moreover, it was obvious that the question could be raised again both in the Sixth Committee of the General Assembly and at the Commission's next session.

49. Prince AJIBOLA said that he shared the Chairman's views, even though it was quite natural for all members of the Commission to wish to comment on the statement the Special Rapporteur had just made in summing up the discussion. If the Commission should decide to reopen the debate on the scope of the topic, however, he reserved the right to speak on that question at length.

50. Mr. AL-KHASAWNEH said that, even if the Commission referred the draft articles to the Drafting Committee, there was nothing to prevent it from asking the Sixth Committee of the General Assembly about the concepts of strict liability and absolute liability, provided that it placed them in their proper context. In accordance with the dictum *fatum nomen est*, those two concepts suffered because of the names—"strict" and "absolute"—they had been given. Since he had been the only one to raise the question whether activities should be postponed until an appropriate régime had been established, the Special Rapporteur had been wrong to conclude (para. 33 above) that the Commission had reached some sort of agreement on that point. Moreover, at the 2114th meeting (para. 16), he had referred not only to Islamic law, but also to decisions by the ICJ concerning interim measures of protection; he had also cited recent articles in the *Netherlands Yearbook of International Law*.

51. The CHAIRMAN suggested that the question raised by Mr. Barsegov should be reflected in the Commission's report in order to draw the Sixth Committee's attention to the matter.

52. Mr. EIRIKSSON said that he basically agreed with the Chairman's point of view and that, at the appropriate time, the Commission could decide how the question was to be mentioned in its report. The Special Rapporteur had already outlined his conclusions before the previous draft articles 1 to 10 had been referred to the Drafting Committee. In 1988, the Sixth Committee of the General Assembly had endorsed those conclusions, which had also received very broad support in the Commission. However, since Mr. Barsegov had raised the question of strict liability, it might be better, as matters now stood, to say that a tentative solution had been found because the guidelines to be followed for negotiations on reparation or compensation still had to be formulated. The Special Rapporteur would have to deal with those questions as early as possible.

53. Mr. BEESLEY said that he agreed with Mr. Eiriksson and recalled that, when the Commission had referred the previous draft articles 1 to 10 to the Drafting Committee, several members of the Commission had particularly stressed that those texts were being so referred on the understanding that they would be reworded to take account of the three general principles referred to by the Special Rapporteur[18] and taken from the study by his predecessor. Those same members had stressed that it was particularly necessary to take account of the principle that the innocent victim should not have to bear the loss. Although he welcomed the way in which the Special Rapporteur had summed up the discussion, he had reservations about choosing one particular issue to submit to the Sixth Committee. If the issue was to be well received, it would have to be accompanied by reasoned and well-documented explanations on the distinction between absolute liability, which was built into a wide range of existing international conventions, and strict liability, which was a lesser burden and derived from the practice of States. In the final analysis, it would be better not to raise the issue. He himself had at least a dozen questions on which he would like answers from the Sixth Committee, but he believed that members of the Commission should first hold consultations before choosing one question rather than another from all those that could be put to the Sixth Committee.

54. The CHAIRMAN, having consulted several members of the Commission, said that, if there were no objections, he would take it that the Commission agreed to refer the revised draft articles 1 to 9 to the Drafting Committee.

It was so agreed.

55. The CHAIRMAN suggested that the Special Rapporteur be invited to draft the questions intended for the Sixth Committee of the General Assembly for the purpose of drawing its attention to some of the main problems on which its views would be welcome. The Commission would examine those questions during the consideration of its draft report, in which the comments made by Mr. Barsegov and Mr. Francis would also be reflected.

It was so agreed.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/410 and Add.1-5,[19] A/CN.4/415,[20] A/CN.4/422 and Add.1,[21] A/CN.4/L.431, sect. F)

[Agenda item 3]

Second report of the Special Rapporteur (*continued*)

Consideration of the draft articles[22] on second reading (*continued*)

56. Mr. OGISO (Special Rapporteur), summing up the debate on his first two reports, said that, since the summary records of the meetings on the topic had not all been available, he might unintentionally overlook some of the questions raised during the discussion. In order to save time, moreover, he would not systematically refer by name to all those who had spoken on one point or another.

57. In his second report (A/CN.4/422 and Add.1), he had explained the recent trend on the part of a number of States which had hitherto adhered to the principle of absolute immunity to change their positions in favour of restricted immunity. That trend was apparent not only in judicial

[18] See *Yearbook . . . 1987*, vol. II (Part Two), p. 49, para. 194 (*d*).

[19] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[20] *Ibid.*

[21] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[22] For the texts, see 2114th meeting, para. 31.

decisions, but also in new domestic legislation and in international agreements. Several members of the Commission had objected to his statement, in reiteration of a view expressed by Sir Ian Sinclair, that "it can no longer be maintained that the absolute theory of State immunity is a universally binding norm of customary international law" (*ibid.*, para. 10). In his own view, which was not substantially different from Sir Ian's, there was "no general consensus in favour of absolute immunity" (*ibid.*). His point was thus that, in the realm of State immunity, there was no theoretical consensus as to whether the absolute theory or the restrictive theory was the rule and that efforts should therefore be made to reach agreement on the areas of State activity to which immunity would not apply.

58. From that point of view, he welcomed the fact that several members had drawn attention to the need for a pragmatic approach and the fact that there had been no objection to that opinion. That seemed to indicate, at least at the present stage, that there was a general consensus on the method to be followed for the future consideration of the topic.

59. Mr. Koroma (2115th meeting) had made the point that the historical analysis contained in his reports had been restricted to Western developed countries; his predecessor had faced the same criticism. In the case of the African countries, however, it was very difficult to find examples of relevant judicial decisions and, except in South Africa, there was no domestic legislation on the topic. Since the subject was predominantly legal and technical, he had preferred to rely on court decisions and domestic legislation, where they existed, rather than on declarations of a political nature. He had had great expectations of the written comments and observations of Governments. Unfortunately, of all the African countries, only the Government of Cameroon had responded to the General Assembly's request for comments. He had duly taken account of that point of view, but could not deduce that it represented the view of the majority of countries in that part of the world.

60. A similar criticism had been expressed by Mr. Njenga (2117th meeting) with regard to the idea that the Asian-African Legal Consultative Committee favoured the restrictive theory of State immunity. According to paragraph (32) of the commentary to article 11 (formerly article 12), on commercial contracts, however, the position was that, in 1960, the Asian-African Legal Consultative Committee had adopted the final report of its Committee on Immunity of States in respect of Commercial and other Transactions of a Private Character, which had stated that all delegations except that of Indonesia had been of the view that "immunity to foreign States should not be granted in respect of their activities which may be called commercial or of private nature".[23] Similarly, in the statement he had made as an observer at the Commission's thirty-eighth session, Mr. Sen, then Secretary-General of the Asian-African Legal Consultative Committee, had said that: "Personally, he considered that a restrictive doctrine was perhaps not out of place, in view of the extension of governmental activity in numerous fields. The problem was to determine the extent to which restrictions would be reasonable."[24] Although that statement was not the formal view of the Asian-African Legal Consultative Committee, it could not be interpreted as a position in favour of absolute immunity. He therefore invited Mr. Njenga to communicate to him the other relevant documents which he might need.

61. Turning to the comments to which the draft articles themselves had given rise, he noted that article 1 appeared to be generally acceptable. It had been said that article 6, which stated the basic idea of the draft as a whole, should come immediately after article 1. It had even been suggested that article 6 should form an integral part of article 1. He was prepared to refer those suggestions to the Drafting Committee, but would prefer to maintain the order of the articles as they stood so that the general principle embodied in article 6 and the limitations and exceptions provided for in articles 11 to 19 would not be too far apart.

62. With regard to the proposed new article 2 (A/CN.4/415, para. 29), most members supported the merger of former articles 2 and 3 and the new text had given rise to no objection. The Government of the German Democratic Republic had suggested in its written comments that the definition of the term "court" in paragraph 1 (*a*) should include a precise explanation of the expression "judicial functions" and Mr. Njenga had suggested in that connection that section 3 of the Australia's *Foreign States Immunities Act 1985* could serve as a reference. In his own view, however, it would be difficult to give a definition of that expression in the body of the article, not only because it would be tautological, but also because national systems were not all the same. He would therefore prefer to include an appropriate explanation in the commentary, since the matter should in any event be referred to the Drafting Committee.

63. With regard to paragraph 1 (*b*) (ii), which included among the organs of States entitled to immunity political subdivisions of the State which were entitled to perform acts in the exercise of the sovereign authority of the State, Mr. Tomuschat (2115th meeting) and some other members considered that the constituent states of a federal State should be entitled to immunity even if they did not act for or on behalf of the central Government. In their view, therefore, the expression *prérogatives de la puissance publique* should be rendered in English by "governmental authority". On that point, he would refer members to paragraph (3) of the commentary to article 3, which stated that the political subdivisions of a State included "the political subdivisions of a federal State or of a State with autonomous regions which are entitled to perform acts in the exercise of the sovereign authority of the State" and that "sovereign authority" was the nearest equivalent to the expression *prérogatives de la puissance publique*.[25] He would also refer members to paragraph (12) of the commentary to article 7, which stated that

> there is nothing to preclude the possibility of such autonomous entities being constituted or acting as organs of the central Government or as State agencies performing sovereign acts of the foreign State. A constituent state of a federal union normally enjoys no immunity as a sovereign State, unless it can establish that the proceeding against it in fact implicates the foreign State. . . .[26]

[23] *Yearbook . . . 1983*, vol. II (Part Two), p. 33.

[24] *Yearbook . . . 1986*, vol. I, p. 100, 1958th meeting, para. 37.

[25] *Yearbook . . . 1986*, vol. II (Part Two), p. 14.

[26] *Yearbook . . . 1982*, vol. II (Part Two), pp. 103-104.

Since, according to the commentary to article 3, "subdivisions of the State at the administrative level of local or municipal authorities do not normally perform acts in the exercise of the sovereign authority of the State, and as such do not enjoy State immunity" (para. (3)), he considered that the change of wording proposed by the members in question would involve a change of substance. When the matter was referred to the Drafting Committee, that point would have to be borne in mind.

64. Mr. Thiam and Mr. Bennouna (2117th meeting) had suggested that paragraph 1 (*b*) (iv) of the new article 2 be deleted. However, since proceedings brought against an ambassador, a diplomatic or consular official or any other representative of a Government might implicate the foreign State, and since such persons were not covered by paragraph 1 (*b*) (i) to (iii), they should be included among the persons who enjoyed State immunities as "representatives of the State". The relationship between the present draft articles and the relevant Vienna Conventions was governed by article 4.

65. The two drafting points raised with regard to the definition of the expression "commercial contract", in paragraph 1 (*c*) of the new article 2, should, in his view, be dealt with by the Drafting Committee. In subparagraph (*c*) (iii), however, it would be desirable to retain the word "commercial", which covered contracts and agreements relating to a variety of activities, including manufacturing and investment, while excluding employment contracts, which were frequently cited as an example of non-commercial contracts that should be subject to the jurisdiction of the forum State. Mr. McCaffrey (*ibid.*) and Mr. Tomuschat had proposed that the expression "commercial contract" be replaced by "commercial activity". He noted in that connection that, although the previous Special Rapporteur had used the expression "commercial transaction" in his preliminary report[27] and the expression "trading or commercial activity" in his second and fourth reports,[28] the provision adopted in 1983 as article 12 (now article 11) had been entitled "Commercial contracts". He assumed that the title had been changed in the course of the Drafting Committee's discussions at the 1983 session, but could not explain why or how. If, however, the majority of the members of the Commission were in favour of reconsidering the title "Commercial contracts", he was ready to accede to their wish.

66. Eleven members had expressed support for his proposal for paragraph 3 of the new article 2, three had said that they were neutral—although they agreed that both the nature and the purpose of the contract should be taken into account—and four members had voiced criticism mainly because the new formulation was too rigid to cover unforeseen circumstances. That criticism deserved due consideration. While he thought that the actual wording should be left to the Drafting Committee, it might be desirable to add the following phrase at the end of the paragraph: "it being understood that a court of the forum State may, in the case of unforeseen situations, decide that the contract has a public purpose". He further proposed, in the light of a comment made by Mr. McCaffrey, that the first part of the paragraph be amended to read: "In determining whether a contract under paragraph 1 (*c*) is commercial . . .". Again, that was a matter to be referred to the Drafting Committee.

67. Article 4 had met with little criticism and most of the members who had spoken on the subject agreed with his proposal to add the words "under international law" in paragraph 1. Some members, though in general agreement with the article, had sought clarification with regard to the legal relationship between immunity under the present articles and that conferred by the relevant Vienna Conventions. Other members, however, had expressed the view that those Conventions and the present articles were of an entirely different nature and Mr. Thiam had even said that the difference between the two régimes was so obvious that article 4 itself was unnecessary. Although he was unable to accept the latter view, he agreed in general that the two régimes could be applied separately. A number of members had also proposed that the privileges and immunities granted to heads of State *ratione personae* should be extended to other persons of high rank, such as heads of Government and ministers for foreign affairs. In that connection, he would point out that the privileges and immunities of diplomatic agents and related persons were covered by a special régime under the Vienna Conventions, whereas those of heads of State *ratione personae* were covered by the rules of customary international law. The privileges and immunities of the families of heads of State and other high-ranking officials were accorded as a matter of international comity. Although he was not particularly in favour of it, he would not object to the inclusion of a reference in paragraph 2 to those categories of persons whose privileges and immunities were not, strictly speaking, covered by international law. However, the Drafting Committee would no doubt take account in due course of the subtle difference between international law and international comity in that regard.

68. Article 5 did not call for any particular comment. With regard to article 6, many members had supported his proposal to delete the phrase in square brackets, "and the relevant rules of general international law"; 10 Governments had been in favour of its deletion and 10 against. His main reason for proposing the deletion of the phrase was the fear that it might be used by the courts of the forum State to interpret the present articles unilaterally, particularly with respect to limitations and exceptions, although some members had alluded to other reasons. Only Mr. McCaffrey had categorically objected to its deletion, although two other members had expressed some reluctance on that score. He believed, however, that the Drafting Committee should be allowed to work on the basis of the text adopted on first reading, on the assumption that the phrase in square brackets could be deleted eventually. Since Governments were divided on the point, however, and since the deletion of the phrase would mean a substantial sacrifice on the part of States which favoured restricted immunity, he had proposed two other possible solutions to the Commission—partly to compensate for that sacrifice and partly to take account of the situation of countries which had enacted legislation on State immunity, but also because some of

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[27] *Yearbook . . . 1979*, vol. II (Part One), p. 227, document A/CN.4/323.

[28] *Yearbook . . . 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; and *Yearbook . . . 1982*, vol. II (Part One), p. 199, document A/CN.4/357.

the limitations or exceptions provided for under that legislation were not contained in the draft articles.

69. The first possible solution was that the paragraph suggested by Spain (A/CN.4/410 and Add.1-5) be included in the preamble to the future convention. While a few members had expressed their willingness to go along with that idea, more members had been opposed to it. In addition, the preamble was, by tradition, dealt with at the diplomatic conference. The second possible solution was to include the proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17), to provide for the exceptions that might arise in future as a result of changes or developments in customary international law and also to fill any possible gaps between the present articles and domestic legislation. The second solution had not been accepted by any member and, accordingly, neither of the proposals could serve as a basis for discussion. He had not taken up Australia's proposed reformulations of the bracketed phrase in article 6 (A/CN.4/410 and Add.1-5) because they seemed to differ little in substance from the phrase itself. He trusted that the Drafting Committee would try to find a formula that would bridge the gap, at least for the time being, between the draft articles and domestic legislation, for example by way of an additional protocol.

70. Most members who had spoken on article 7 supported the proposed new text (A/CN.4/415, para. 79), apart from some comments concerning drafting and the possible deletion of paragraph 3. That paragraph had already been simplified by comparison with the adopted text, but he would have no objection if it were further simplified in the Drafting Committee.

71. With regard to article 8, while several members had supported his proposal concerning subparagraph (*c*) (*ibid.*, para. 93), others had proposed that it be reformulated in a less restrictive manner to provide for express consent through diplomatic channels. Although subparagraph (*a*) seemed to him to suffice in that regard, he had no objection to the matter being referred to the Drafting Committee. Mr. Koroma (2118th meeting), who did not accept the explanations concerning subparagraph (*b*) given in the preliminary report (A/CN.4/415, para. 89), had suggested that a fundamental change of circumstances due to *force majeure* should be contemplated. He personally was not very much in favour of that theory, because it placed undue reliance on the unilateral assessment of one party and because, historically, it had been abused before and during the Second World War, albeit in another context. He therefore maintained the views he had expressed in his preliminary report in that connection.

72. Lastly, with regard to article 9, the reservation which he had proposed should be added to paragraph 1 (*ibid.*, para. 100), namely "However, if the State satisfies the court . . . provided it does so at the earliest possible moment", applied only to subparagraph (*b*) and had been accepted by several members. A number of members had also accepted the proposed new paragraph 3 concerning the effect of the appearance of a representative of a State as a witness before a court of another State. A few members had opposed that paragraph, although the reasons for their objection were not apparent. For his own part, he continued to regard the additional paragraph as necessary. The suggestions of a drafting nature made with regard to the article could be considered in the Drafting Committee.

The meeting rose at 1 p.m.

2122nd MEETING

Wednesday, 21 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Jurisdictional immunities of States and their property (*concluded*) (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/422 and Add.1,[3] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

CONSIDERATION OF THE DRAFT ARTICLES[4] ON SECOND READING (*concluded*)

1. Mr. OGISO (Special Rapporteur), continuing his summing-up of the debate, said that one member had supported the suggestion by Australia (A/CN.4/410 and Add.1-5) to combine paragraphs 1 and 2 of article 10. It was a drafting matter and the best course would be to refer it to the Drafting Committee.

2. Some members had expressed doubts about the applicability of the proposed new paragraph 4 (A/CN.4/415, para. 107), which had its origin in a suggestion by the Government of Thailand. The purpose was to limit the effect of a counter-claim against a foreign State. Article 10 as adopted applied to counter-claims against a foreign State which brought suit, or intervened in an action, in a court of another State. Paragraphs 1 and 2 specified that, if a foreign State which was itself entitled to immunity instituted, or intervened in, a proceeding in the forum State and a counter-claim was entered against it, it would not be immune from that counter-claim if the matter arose out of the same legal relationship or facts as the principal claim.

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

[2] *Ibid.*

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

[4] For the texts, see 2114th meeting, para. 31.

Under the proposed paragraph 4, the legal effect of the counter-claim against the foreign State would be limited to the amount of the principal claim. If the amount of the counter-claim exceeded that of the principal claim, the legal effect of the counter-claim would in practice be a set-off. If, however, the claim or counter-claim became the subject of litigation, the evaluation of the claim or counter-claim would constitute a complicating factor. He was not an expert in the field of claims litigation and he would be prepared to withdraw the proposal if there was strong opposition to it. Nevertheless, one could cite as an example the case of a foreign State A which instituted, or intervened in, a proceeding in a court of the forum State. The defendant B might then purchase from various sources debts attributable to State A and use them to present a counter-claim against State A in an amount far exceeding the original claim of that State. His intention had been to prevent such a possibility with the new paragraph 4, which did, admittedly, require drafting improvements.

3. The majority of members preferred the wording "Exceptions to" in the title of part III of the draft, but he still believed that the question should not be decided until the second reading was completed, when the entire picture would become much clearer. In that connection, Mr. McCaffrey's interesting suggestion to reword the title as "Cases in which State immunity may not be invoked before a court of another State" (2117th meeting, para. 91) could be referred to the Drafting Committee.

4. There was wide support for his recommendation to replace the last part of paragraph 1 of article 11, reading "the State is considered to have consented to the exercise of that jurisdiction . . .", by the words "the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial contract". Some members disagreed with the concept of a jurisdictional link contained in the words "by virtue of the applicable rules of private international law". On that point, he maintained his original position, because of the possible differences between various forum States on the applicable law for transnational commercial contracts. It had been suggested that the proviso "Unless otherwise agreed . . ." might be added, but since the provision in question was a basic one, it was highly undesirable to allow any deviation, whether by bilateral or regional agreement or by written contract. As he understood it, there were no rules of customary international law which required a sufficient nexus between the commercial contract and the local jurisdiction. The requirement set out in article 7, paragraph 1, of the 1972 European Convention on State Immunity was much too strict. For present purposes, therefore, it was sufficient that the local court usually had its own ordinary rules on jurisdiction in regard to a commercial contract concluded between a national and a foreign person or entity.

5. He had no objection to the suggestion by Mr. Al-Qaysi to the effect that "a provision in a commercial contract that it is to be governed by the law of another State is not to be deemed a submission to the jurisdiction of the court of that State". It should be considered by the Drafting Committee, in connection with either article 11 or article 8.

6. The new article 11 *bis*, on segregated State property (A/CN.4/415, para. 122), which he had proposed in response to comments made by the USSR and the Byelorussian SSR, had raised some questions. The request for clarification of the concept of a "State enterprise" had, to a large extent, been answered during the discussion by Mr. Barsegov (2116th and 2117th meetings) and Mr. Graefrath (2120th meeting). As Special Rapporteur, he would endeavour to formulate some general definition of "State enterprise" and of "segregated State property" on the basis of the Soviet Union's 1988 law on State enterprises if it were made available. Some members had criticized the use of the words "on behalf of a State" on the grounds that State enterprises would enter into a commercial contract on their own behalf with a foreign national or corporation. In the light of the explanations given in the course of the discussion, he agreed that it was preferable to delete those words.

7. Some members had pointed to the difficulty of separating a State enterprise from the State itself, and he hoped that a study of the Soviet law on State enterprises would help to clear up that problem. Mr. Al-Baharna (2119th meeting, para. 1) had made an interesting proposal for a new title for article 11 *bis*, namely "State enterprises". Some members had expressed doubts about the need to include article 11 *bis* at all. That matter was tied in with the definition of the term "State" in the new draft article 2, on the use of terms. In his opinion, more research should be done with a view to submitting the necessary materials to the Drafting Committee for it to consider various options, including the formulation of definitions of a "State enterprise" and "segregated State property".

8. Two alternative texts similar to article 11 *bis* had been proposed, one by Mr. Shi (2115th meeting, para. 24) and the other by Mr. Barsegov (2117th meeting, para. 1), and they would be referred to the Drafting Committee along with his own proposal. Both the proposed alternatives emphasized that a State enterprise was a legal entity separate from the State itself. Accordingly, no action could be brought against the State itself with regard to a commercial contract entered into by the State enterprise. If such an action was initiated, the State could invoke its immunity. Several members had considered the two proposals useful, but had taken the view that they called for further examination. In particular, some had voiced doubts concerning the extent to which the practice of the socialist countries should be reflected in an instrument intended for the international community at large. On that question of the general applicability of article 11 *bis*, others had urged a careful and detailed study of the legal implications for the developing countries.

9. Two members had considered article 12 to be necessary, whereas two others had deemed it superfluous. Some members had supported his recommendation to delete paragraph 2 (*a*) and (*b*) (A/CN.4/415, para. 132), but others had opposed the deletion. Actually, article 12 as adopted, after declaring the non-application of State immunity with respect to employment contracts in general in paragraph 1, went on to revive a great deal of that immunity in paragraph 2 (*a*) to (*e*). In particular, paragraph 2 (*b*) narrowed down the possibility of applying the local labour law by removing the "recruitment, renewal of employment or reinstatement of an individual" from the operation of paragraph 1, thereby making it very difficult to protect the position of the employee under that law. It should be noted that neither the 1972 European Convention on State Immunity nor the United Kingdom *State Immunity Act 1978* contained any

comparable provisions. In a recent case tried by the Tokyo District Court, a Japanese employee of the Commission of the European Communities had brought suit against her employer for annulment of her dismissal. She had sought a temporary order for wage payments, but the employer had objected that if the court issued such an order it would be infringing the immunity from execution stipulated in article 32 of the 1961 Vienna Convention on Diplomatic Relations. In its decision, rendered in 1982, the court had ruled that the Commission of the European Communities had waived its immunity by specifying in the employment contract that Japanese law was the applicable law governing the contract. As to the merits, the court had found that the dismissal had been reasonable in the light of the employment contract, which had provided for trial employment or temporary employment of the plaintiff. As Mr. Graefrath had noted, a foreign State could not be compelled by the State of the forum to employ a particular individual. In order to meet that concern, the word "recruitment" in paragraph 2 (*b*) could be deleted.

10. In his second report (A/CN.4/422 and Add.1, para. 22), he had said that the scope of article 13 should be reconsidered. Some members had suggested that the article be deleted altogether—some because the relevant cases were very few, others because the situations envisaged in the article were governed by bilateral agreements or by other international treaties. One member had pointed out that personal injury or damage to property would usually be insurable and another that the only real legal basis for the article lay in recent legislation in a very small number of countries.

11. With regard to the question of State responsibility, it had been said that the attribution of an act or omission to a State would prejudge the matter of State responsibility and that the scope of article 13 should therefore be clarified. In that connection, it had been pointed out that a possible range of the article connected with a certain area of activity attributable to the foreign State and that the extent to which a domestic court could enter into that area had to be elaborated much more. Several members, however, had supported the idea of retaining the article, since it was intended to permit normal proceedings and to provide relief for an individual who suffered physical damage as a result of action on the part of a foreign State in the forum State.

12. One way out of the difficulties stemming from article 13 might be to narrow its scope to traffic accidents, as he had in fact suggested. With regard to the so-called "presence requirement", it had been urged that the phrase "and if the author of the act or omission was present in that territory at the time of the act or omission" be kept, as he had also suggested, because the article did not deal with cases of transboundary harm. He had an open mind on that point. The proposed new paragraph 2 (A/CN.4/415, para. 143) had been criticized as being unnecessary, but no reasons had been given. In any case, further examination of the article would be required with respect to the basic question of its relationship with State responsibility. In the light of the variety of views expressed on the subject, he would like to withhold further comment until the next session.

13. His recommendation to reconsider paragraph 1 (*c*), (*d*) and (*e*) of article 14 had enlisted considerable support. In that connection, it had been claimed that there was no link between the property mentioned in paragraph 1 (*b*), (*c*), (*d*) and (*e*) and the forum State. The comment was perhaps valid for subparagraphs (*c*), (*d*) and (*e*), but he had doubts regarding subparagraph (*b*). Some members had suggested deleting paragraph 2 because it might conflict with paragraph 3 of article 7. It had also been said that the word "interest" could be replaced by a more suitable term. Both those proposals should be referred to the Drafting Committee.

14. Some members had been in favour of retaining article 16, while others had questioned its usefulness. He would prefer to comment on the subject after hearing other views.

15. Article 17 reiterated an established rule of sovereign immunity, and the only question concerned the need to use a more general form of language in paragraph 1 (*b*), a matter that could be discussed in the Drafting Committee.

16. All but two of the members who had addressed the point had endorsed his recommendation to delete the term "non-governmental" in paragraphs 1 and 4 of article 18. Mr. Mahiou (2119th meeting) had said that there was a clear difference between the expressions "commercial [non-governmental]" and "government non-commercial", suggesting that the former expression could be understood in the context of article 18 to cover the case of "commercial but also government" service. Yet that argument had been criticized as having excessively complex legal implications. A further point to be noted in connection with article 18 was that a number of members had agreed with his suggestion (A/CN.4/422 and Add.1, para. 31 *in fine*) that the question of the immunity of State-owned or State-operated aircraft should be dealt with under existing international agreements. In addition, paragraph 6 of the article seemed to be open to misinterpretation: it might be taken to apply only to ships, whereas in reality States could, of course, plead all measures of defence available to private persons with respect to property other than ships. It was because of that potential misunderstanding that he proposed deleting the paragraph.

17. In his view, the Commission had tended to attach too much importance to the choice between the expressions "commercial contract" and "civil or commercial matter" in article 19. The scope of arbitration and the extent of a waiver of State immunity resulting from an arbitration agreement depended on the content of the agreement in question. The Commission should focus attention on the extent of waivers of immunity by a foreign State with respect to arbitration agreements, which might come to play an increasingly important role in resolving differences arising from various transnational activities. Opinion on his proposal to add a new subparagraph (*d*) reading: "the recognition of the award" had been divided. The problem of determining the proper place for the subparagraph could be resolved by an understanding to the effect that it was not to be interpreted as implying a waiver of immunity from execution.

18. He had originally recommended that article 20 be retained without change and had done so simply because it had been left almost intact on first reading. Naturally, if the majority of members favoured deleting it he would abide by their wish. On the other hand, he would be

reluctant to accept the suggestion that the article—which, after all, was only a general reservation clause—be placed among the introductory provisions; the subject of article 20 was not the main subject of the draft, and moving the article to a more prominent position would be misleading.

19. One member had suggested that article 21 be reformulated along the lines of article 23 of the 1972 European Convention on State Immunity in order to reflect more explicitly the principle of State immunity from measures of constraint. Another member had suggested that the article be formulated as a general provision rather than as an exception, and had also favoured the inclusion of a provision making it obligatory for States to abide by final court decisions rendered against them on the basis of the future convention. He would examine those suggestions further. Views had differed on the question of deleting the phrase "or property in which it has a legally protected interest", and also the term "non-governmental" in subparagraph (*a*). Moreover, it had been suggested that the words "in which it has a legally protected interest" be replaced by "to which it has an effective right". He hoped for more comments at the next session on the question of deleting the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", in subparagraph (*a*), and on the possibility of adding the phrase "Unless otherwise agreed between the States concerned" at the beginning of the article as an alternative.

20. His recommendation to omit the bracketed phrase in paragraph 1 of article 22 had met with support; however, one member had suggested using the words "effective right" instead of "legally protected interest". Another member had proposed a new text for article 22 in consequence of his proposal for amending article 21.

21. As to article 23, he had in his preliminary report (A/CN.4/415, para. 240) proposed an amended paragraph 2 with the intention of excluding some of the categories of property mentioned in paragraph 1 from measures of constraint. However, in his second report, he had endorsed the adopted text of paragraph 2, which had also been supported by two members. Two members had disagreed with the idea of adding the words "and serves monetary purposes" at the end of paragraph 1 (*c*), on the grounds that any bank account, including a central bank's account, was established for monetary purposes and that the proposed addition would therefore give rise to confusion. His own view on that point was that a central bank's account was usually presumed to be established for monetary purposes and that the account enjoyed immunity from execution unless it was allocated or being used for commercial purposes.

22. The amended text which he had proposed for paragraph 1 of article 24 (*ibid.*, para. 248) had been considered acceptable by two members, who had also suggested deleting the words "if necessary" in paragraph 3. The same members had also proposed deleting those words from paragraph 2 of article 25, one of them suggesting, in addition, that paragraph 1 of article 25 be reviewed as a matter of prudence in order to ensure that no default judgment could be entered by a court without establishment of jurisdiction and right to relief based upon evidence by the plaintiff. With regard to the same paragraph, another member had pointed out that documents should not be assumed to have been received.

23. One of the members opposing his proposal that paragraph 2 of article 27 be amended so as to apply only to a defendant State had argued that the proposed limitation would discourage States from instituting proceedings as claimants.

24. It had been maintained that article 28 was not really concerned with the question of discrimination. The necessity of article 28 as a whole and especially of paragraph 2 had been discussed in connection with the possible deletion from article 6 of the bracketed phrase "and the relevant rules of general international law". Some members had said that article 28 should be retained if that phrase were removed from article 6, whereas others had doubted the advisability of including article 28, fearing that a restrictive application based on reciprocity would lead to departures from the future convention and detract from the purpose of codification. One member had also pointed out that, since almost all the provisions of the draft on exceptions began with the words "Unless otherwise agreed . . . ", article 28 was not needed. Clearly, a further exchange of views, especially as to the legal effects of article 28, was required.

25. Lastly, he proposed that the Commission refer articles 1 to 11 *bis* to the Drafting Committee, on the understanding that the Commission would take up articles 12 to 28 as the first item for discussion at the next session with a view to referring them to the Drafting Committee at that time.

26. Mr. REUTER, supported by Mr. McCAFFREY, said he generally agreed with that proposal but wondered whether the dividing line should not be drawn at article 11, rather than at the new article 11 *bis*. The Commission had not yet had time to consider the highly interesting texts proposed for article 11 *bis* by Mr. Barsegov and Mr. Shi.

27. The CHAIRMAN pointed out that it would be difficult to dissociate article 11 *bis* from the rest of the articles to be referred to the Drafting Committee because it was closely related to article 2.

28. Mr. CALERO RODRIGUES said that he would be prepared to accept the Special Rapporteur's proposal on the understanding that any decision by the Drafting Committee on article 11 *bis* would be provisional and that the Commission would reconsider the article at the next session.

29. The CHAIRMAN assured members that that would be the case.

30. Mr. NJENGA, supported by Prince AJIBOLA and Mr. BENNOUNA, suggested that the new article 6 *bis*, which had not been considered on first reading and for which no support had been expressed in the Commission, should not be referred to the Drafting Committee.

31. Mr. REUTER said that he was opposed in principle to removing any text which had been discussed in the Commission.

32. Mr. DÍAZ GONZÁLEZ said that he deprecated the tendency to assign to the Drafting Committee matters that were properly the concern of the Commission.

33. Further to a discussion in which Mr. KOROMA, Prince AJIBOLA and Mr. AL-BAHARNA took part, the

CHAIRMAN suggested that articles 1 to 11 be referred to the Drafting Committee for their second reading, together with the new articles 6 *bis* and 11 *bis* proposed by the Special Rapporteur. The Commission would consider articles 12 to 28 at the beginning of the next session.

It was so agreed.

34. Mr. KOROMA, referring to the earlier part of the Special Rapporteur's summing-up at the previous meeting, said he wished to place on record that, in advocating a more universal approach, he had not criticized the Special Rapporteur's approach as being based on the judicial decisions in a particular region. His point was that it would not be advisable for the draft articles to rely on decisions that were not universally accepted. As to his suggestion to the effect that the draft should include a provision based on the principle *rebus sic stantibus*, he had no opinion concerning the possible abuses of that principle mentioned by the Special Rapporteur, but continued to believe that the principle had firm legal foundations recognized by almost all modern writers on international law. It should be reflected in the draft as one of the principles under which a commercial contract could be invalidated.

State responsibility (*continued*)* (A/CN.4/416 and Add.1,[5] A/CN.4/L.431, sect. G)

[Agenda item 2]

Parts 2 and 3 of the draft articles[6]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 6 (Cessation of an internationally wrongful act of a continuing character) *and*

ARTICLE 7 (Restitution in kind)[7] (*continued*)

35. Mr. AL-BAHARNA thanked the Special Rapporteur for his scholarly preliminary report (A/CN.4/416 and Add.1), in which he proposed new articles on cessation and restitution in kind against the background of both legal doctrine and State practice.

36. The question of cessation raised three sub-questions: What was the nature and scope of cessation? At the contemporary stage of international law, was it feasible to prescribe that obligation? What was its relationship to reparation?

37. The term "cessation" was not a term of art, and hence it called for a definition. Cessation as a remedy intended to put an end to the consequences of an internationally wrongful act seemed to be equated by the Special Rapporteur with discontinuance (*ibid.*, para. 29). But discontinuance in the Special Rapporteur's view covered what he designated as both "commissive" and "omissive" wrongful acts. The scope of cessation or discontinuance was elucidated thus:

> . . . In the case of commissive wrongful acts, cessation will consist of the (negative) obligation to "cease to do" or "to do no longer". . . . In the case of omissive wrongful acts, cessation should cover the author State's thus far undischarged obligation "to do" or "to do in a certain way". . . . (*Ibid.*, para. 58.)

38. Although the term "cessation" did not seem to convey the dual sense the Special Rapporteur attributed to it, there was no particular legal obstacle to placing such connotations on it. In national legal systems that he knew of, the remedy of "injunction" included both "to refrain from doing" and "to do a particular act or thing". Whether the term "cessation" had been used in that dual sense in international theory and State practice, however, was another matter.

39. Contemporary international law did not seem to have developed to the point of recognizing the obligation of cessation of a wrongful act in the sense of "to do" or "to do in a certain way". As Gunnar Lagergren, sole arbitrator in the *BP Exploration Company (Libya) Limited* v. *Government of the Libyan Arab Republic* case, had stated, "the case analysis also demonstrates that the responsibility incurred by the defaulting party for breach of an obligation to perform a contractual undertaking is a duty to pay damages" (*ibid.*, para. 46). States probably resorted to damages because it was far more practical to do so. But there could be exigencies when the remedy of damages was either useless or inadequate, as in the case of wrongful detention of nationals of an injured State. Consequently, international law must be developed to cover such an eventuality. Therein lay the merit of the proposal to include "omissive" wrongful acts within the concept of "cessation". That proposal was worthy of examination, and possibly of support. As to whether States would comply with such an obligation in the absence of institutional mechanisms in the international sphere, that was a matter which concerned the whole range of international law, and not only the postulated rule; even so, it was worth examining.

40. Cessation and reparation were logically distinct, although in some cases they might be inextricably linked. In municipal law, they were certainly distinct. The Special Rapporteur was apparently developing international law on the basis of analogy. There was ample authority for such an approach, for example in the *Trail Smelter* arbitration cited by the Special Rapporteur (*ibid.*, footnote 65). He supported the Special Rapporteur's statement that "the two remedies either are factually separate or appear in combination but are nevertheless distinct" (*ibid.*, para. 52).

41. Considering the need for rules and procedures to strengthen international legal order, he supported the Special Rapporteur's departure from his predecessor's approach in proposing a new article 6 of part 2 of the draft under the title "Cessation of an internationally wrongful act of a

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* Resumed from the 2105th meeting.

[5] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[6] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook . . . 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[7] For the texts, see 2102nd meeting, para. 40.

continuing character", subject to two reservations: (*a*) that the obligation to refrain from the illicit acts and to act in a manner in conformity with the obligations of international law should be drafted more precisely; (*b*) that the term "cessation" should be replaced either by "discontinuance" or by a better alternative.

42. The Special Rapporteur had proposed a text for the new article 7, on restitution in kind, that appeared in some respects to be ingenious and in others controversial. The leading case on the subject, the *Chorzów Factory* case,[8] had laid down the principles of law regarding reparation. Two points were apparent from the case: first, that the object of reparation was to wipe out, in so far as possible, all the consequences of a wrongful act by re-establishing the situation that would have existed had the wrongful act not been committed; and secondly, that if that was not possible, compensation, with or without damages, should be granted. But, as Eduardo Jiménez de Aréchaga, formerly a Judge of the ICJ, had written: "although restitution in kind remains the basic form of reparation, in practice, and in the great majority of cases, monetary compensation takes its place".[9]

43. The Commission should therefore take the practical exigencies into account when formulating the applicable rules, and he was glad to see that the Special Rapporteur had adopted a flexible approach to the remedies to which the injured State could resort. The Special Rapporteur was right in holding the view (*ibid.*, para. 117) that the remedy prescribed should match the injury, and in going on to affirm (*ibid.*, para. 126) that the principle of proportionality between injury and reparation should be borne in mind in formulating the rule on restitution in kind.

44. Against the background of such principles, it could be seen that draft article 7 was well-conceived. However, it required deeper examination, especially paragraphs 1 (*b*) and 2 (*b*).

45. Paragraph 1 (*b*) suggested that there was no need for restitution in kind if it would violate a peremptory norm of general international law. Such a provision would render the operation of restitution in kind problematic and indeterminate. The specification of peremptory norms of general international law was controversial, and the drafting of such a rule on State responsibility was of doubtful validity. He therefore wondered whether there was any reason to retain that subparagraph.

46. As to paragraph 2 (*b*), which spoke of mitigating circumstances arising from the "political, economic or social system of the State which committed the internationally wrongful act", he doubted whether that proposition was supported by either principle or State practice. Anzilotti's statement, cited by the Special Rapporteur (*ibid.*, para. 98), that "there may be obstacles of an internal nature which ... States are prepared to take into account to replace restitution in kind by compensation" was no authority in that regard. Anzilotti had been referring to the contingency of States taking obstacles of an internal nature into consideration in arriving at one remedy or another, but that statement could not be interpreted as meaning that a "political, economic or social system" could be a mitigating factor.

47. Moreover, since a State could not, under international law, avoid international responsibility by invoking its municipal law, it was questionable whether it was really necessary to retain paragraph 3; it could well be deleted.

48. For paragraph 4, on reparation by equivalent, he would prefer a far simpler formulation which, like the judgment in the *Chorzów Factory* case, referred (*a*) to compensation, and (*b*) to damages, and spelled them out in a separate article, under the generic title of "pecuniary compensation".

49. In general, article 7 could be improved by drafting changes. For example, he would prefer the Latin expression *restitutio in integrum* to "restitution in kind", and would like also to see "excessively onerous" and "reparation by equivalent" replaced by more suitable expressions.

50. Mr. BENNOUNA said that he greatly appreciated the Special Rapporteur's preliminary report (A/CN.4/416 and Add.1), which was well documented and scholarly and displayed great subtlety. He agreed with all the technical points advanced by the Special Rapporteur, although he sometimes differed with him in regard to matters of approach and the distinctions drawn.

51. The Special Rapporteur had suggested an outline for part 2 of the draft (*ibid.*, para. 20). It was unfortunate, however, that article 19 of part 1 would serve as the basis for the rest of the draft, for he believed it would greatly complicate the progressive development and codification of international law on State responsibility. The article was a typical intellectual projection, based on categories of penal law that were completely unrelated to international realities, and it would create difficulties in connection with punishment for various delicts and crimes. Dangerous tendencies could already be observed from the report (*ibid.*, para. 15), where the Special Rapporteur introduced a new category of delicts, namely those "of particular seriousness". Such delicts would presumably call for particularly onerous forms of punishment, yet it was hard to see how the Commission would succeed where the Security Council had failed in imposing any such punishment. The Special Rapporteur wisely pointed out (*ibid.*, para. 16) that his suggestion did not imply an attempt to take a stand on any of the practical or theoretical issues involved in the treatment of delicts and crimes.

52. The distinction between cessation of an internationally wrongful act and restitution in kind was entirely artificial, both from the theoretical point of view and as regards the practical consequences. At the beginning of his argument, the Special Rapporteur indicated that cessation was to be ascribed to the continued, normal operation of the primary rule (*ibid.*, para. 31). Yet by the end, he came to the conclusion that a rule on cessation could well be conceived as a provision situated "in between" the primary and the secondary rules (*ibid.*, para. 61).

53. The only case the Special Rapporteur could cite in support of the proposed distinction between cessation and restitution in kind involved the wrongful detention of a State's nationals: the case concerning *United States Diplomatic and Consular Staff in Tehran*.[10] Yet the example

[8] See 2105th meeting, footnote 5.

[9] E. Jiménezz de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sorensen, ed. (London, Macmillan, 1968), p. 567.

[10] See 2104th meeting, footnote 7.

was by no means convincing, for the measures ordered by the ICJ in resolving that case were measures not of cessation, but simply of restitution in kind. The Government of Iran had been enjoined to restore the premises of the United States Embassy in Tehran, to release all United States nationals and to recognize their privileges and immunities.

54. Continuing his argument, the Special Rapporteur maintained (*ibid.*, para. 57) that none of the difficulties which might hinder or prevent restitution in kind was such as to affect the obligation to cease the wrongful conduct. In other words, the allowable exceptions to restitution in kind did not apply in their entirety to cessation. But the obligations in respect of cessation were often the same as those in respect of restitution in kind. Consequently, if an article on cessation was incorporated in the draft, all the exceptions to the operation of restitution in kind provided for in the new draft article 7 would be rendered meaningless. In practical terms, a State would do better to ask for cessation—to which no exceptions were permitted—than to request restitution in kind. If a judge believed that a wrongful act was being committed, he could impose interim measures pending a final judgment. Once the judgment was rendered, there was no need for cessation, as restitution in kind or compensation would be provided for. Hence there was no point in interposing measures of cessation between interim measures and restitution in kind or compensation. The new draft article 6 on cessation therefore served no useful purpose: in fact, instead of clarifying matters, it only added to confusion. As for article 7 on restitution in kind, it was admirably drafted.

55. Mr. AL-QAYSI, commending the Special Rapporteur on his excellent preliminary report (A/CN.4/416 and Add.1), said that on the whole he agreed with the proposals for the outline of parts 2 and 3 of the draft (*ibid.*, para. 20). Those proposals included two points on which the Special Rapporteur intended to depart from the outline previously envisaged by the Commission.

56. The first point related to the need to make a distinction between the legal consequences of international delicts and those of international crimes, and the convincing arguments adduced by the Special Rapporteur in that connection (*ibid.*, paras. 10-15) reflected a clear and pragmatic approach which deserved unanimous approval.

57. He agreed with Mr. Graefrath (2104th meeting), who, though acknowledging that the distinction between substantive and instrumental consequences was not absolute, could not accept the idea that reparation should be regarded as a substantive consequence and the right to take reprisals as procedural inasmuch as it served to secure cessation, reparation and guarantees against repetition. Nevertheless, the report seemed to contain no indication that the Special Rapporteur was making such a categorization. For example, the Special Rapporteur stated that "in a sense, measures are viewed . . . as essentially instrumental", but only "as compared with the substantive role of the various forms of reparation (and of cessation)". (A/CN.4/416 and Add.1, para. 14). The Special Rapporteur had therefore apparently had in mind the type of provision proposed by his predecessor in draft articles 1 to 3 of part 3, particularly in view of his explanation concerning his use of the term "substantive" (*ibid.*, footnote 11).

58. The second point on which the Special Rapporteur intended to depart from the previous outline was his suggestion that the content of part 3 should be viewed in terms of the peaceful settlement of disputes rather than of "implementation" (*mise en oeuvre*), the justification being that implementation embraced both measures and any *onera* incumbent upon the injured State or States as a condition for the lawful resort to measures. He could agree to that suggestion, at least for the time being. Accordingly, as suggested by Mr. Calero Rodrigues (2103rd meeting), articles 1 to 3 of part 3 as proposed by the previous Special Rapporteur should be incorporated in part 2 in an appropriate form.

59. The new draft article 6 of part 2 was at once more concise and more satisfactory than the corresponding text of draft article 6 submitted by the previous Special Rapporteur. He was fully persuaded by the arguments in the report (A/CN.4/416 and Add.1, paras. 39-60) to the effect that cessation should form the subject of an express provision and be distinguished more clearly from the provisions on other aspects of the consequences of violations of international law. Consequently, he did not agree with Mr. Barboza (2102nd meeting) that the Special Rapporteur's views would introduce a conceptual cleavage in the distinction between primary and secondary rules. According to the Special Rapporteur, cessation was "to be ascribed . . . to the continued, normal operation of the primary rule" and not to operation of the secondary rule (A/CN.4/416 and Add.1, para. 31). Mr. Barboza's view would certainly have been justified had it not been for the statement in the report that "While thus falling outside the realm of reparation and of the legal consequences of a wrongful act in a narrow sense, cessation nevertheless falls among the legal consequences of a wrongful act in a broad sense" and, moreover, that cessation was "not irrelevant even from the point of view of the consequences of the wrongful act and of reparation *stricto sensu*" (*ibid.*, para. 32).

60. The new article 6 should remain where it was, in chapter II of part 2, despite the link between cessation and the primary rule. He took that view for the very reasons given by the Special Rapporteur in his report (*ibid.*, para. 55) on which some members had relied in advocating that the article should be placed in chapter I, on general principles. The purpose of that reasoning was to demonstrate the need for an independent provision on cessation, if nothing else. Cessation was a consequence of the wrongful conduct; without such conduct there would be no need for cessation. At the same time, while cessation was independent of other consequences, because of its relationship to the original obligation violated, it was not unrelated to those consequences, since it was in the nature of a prelude. In that connection, the Special Rapporteur urged that a provision on cessation "should not be excluded by such considerations of a theoretical nature", since the distinction between primary and secondary rules was itself relative and since "it follows that a rule on cessation could well be conceived as a provision situated, so to speak, 'in between' the primary rules and the secondary rules" (*ibid.*, para. 61).

61. The doctrinal aspects of the debate prompted two further remarks. First, was it possible to speak of cessation in relation to "omissive" wrongful acts? Some members

had said it was not, rightly considering specific performance to be relevant in such cases. It was also true, however, that omissive acts might well fall into the category of wrongful acts having a continuing character, as explained by the Special Rapporteur (*ibid.*, paras. 42-43). Bearing in mind that both specific performance and cessation related to the primary obligation, was it not the continuing character of the wrongful act that was the determining factor?

62. His second remark concerned the "initial phase" in relation to the timing of a claim for cessation (*ibid.*, para. 38). While he agreed with Mr. Mahiou (2103rd meeting) that the underlying problem was one of prevention, it was one of prevention of the completion of a wrongful act—not prevention of the injurious consequences arising out of acts not prohibited by international law, which were covered by another topic on the Commission's agenda.

63. Like Mr. Razafindralambo (2102nd meeting), he considered that the wording of article 6 should be brought into line with that of article 25 of part 1 of the draft. The amended wording, which would involve using the expression "an act or omission extending in time", would be sufficiently comprehensive to cover single, composite and complex acts or omissions.

64. With regard to the new draft article 7, he fully agreed with the Special Rapporteur that restitution in kind came "foremost, before any other form of reparation *lato sensu*, and particularly before reparation by equivalent" (A/CN.4/416 and Add.1, para. 114). Of the two possible means of restitution—restoration of the *status quo ante* or establishment of the situation as it would have been had there been no wrongful act—he preferred the latter. It was in keeping with the concept recognized in the *Chorzów Factory* case, according to which the author State was bound to "wipe out" all the legal and material consequences of its wrongful act (*ibid.*, footnote 235). Consequently, the injury must be remedied in a "natural", "direct" and "integral" manner (*ibid.*, para. 114).

65. Article 7 did not indicate which meaning should be attributed to *restitutio*, as had draft article 6 as submitted by the previous Special Rapporteur. Whether article 7 was to be criticized on that account, however, depended to a large extent on how paragraph 4 was construed and on how the Special Rapporteur would draft the relevant articles on reparation by equivalent. It would none the less help to dispel doubts if the meaning of restitution were spelt out in the draft, for, as noted in the report, that would indicate "an 'integrated' concept of restitution in kind within which the restitutive and compensatory elements are fused" (*ibid.*, para. 67). It would also accommodate the position of Mr. Graefrath, who would prefer to define *restitutio* as restoration of the *status quo ante*, "which could be clearly determined without prejudice to any compensation of *lucrum cessans*" (2104th meeting, para. 32).

66. He fully endorsed the arguments advanced by the Special Rapporteur with regard to the treatment of aliens (A/CN.4/416 and Add.1, paras. 104-108 and 121-122). Although *restitutio* applied to all wrongful acts, it did not, for instance, apply in situations of physical or legal impossibility. It was right, therefore, that draft article 7 as submitted by the previous Special Rapporteur should be deleted.

67. The need to provide for "material impossibility", as in paragraph 1 (*a*) of the new article 7, was self-evident. Legal impossibility could, of course, derive from international law or municipal law; but only one kind of legal impossibility—deriving from international law—was dealt with in the article, namely in paragraph 1 (*b*), on the case in which restitution would involve a breach of an obligation arising out of a rule of *jus cogens*. He shared the Special Rapporteur's views in that respect, but the practical problem touched on in the report (*ibid.*, para. 87)—namely where an obligation of State A to provide *restitutio* to State B conflicted with a treaty obligation between States A and C—merited further reflection. The problem could not simply be dismissed as a case of factual rather than legal impossibility, since its source derived from obligations under international law and not municipal law. Moreover, as the Special Rapporteur noted, "the juridical obstacles of municipal law are, strictly speaking, factual obstacles from the point of view of international law" (*ibid.*, para. 98). Nor did it suffice, in such a situation, simply to conclude (*ibid.*, para. 124) that State A must resolve the impasse.

68. As to whether legal impossibility could derive from the concept of domestic jurisdiction, he fully endorsed the Special Rapporteur's cogently explained dismissal (*ibid.*, para. 89) of any limitation on *restitutio* on the basis of that concept. He also fully concurred with the Special Rapporteur's views concerning impossibility deriving from municipal law (*ibid.*, para. 98).

69. He further agreed with the substance of the third limitation on *restitutio*, namely excessive onerousness, as set forth in paragraph 1 (*c*) of article 7, and it was particularly gratifying to note the interrelationship between that limitation and the dismissal of legal impossibility deriving from municipal law as reflected in paragraph 3. In that regard, he failed to see how it was possible to rely on article 33 of part 1 of the draft, dealing with a state of necessity, as advocated by Mr. Calero Rodrigues (2103rd meeting), instead of on the standard of excessive onerousness. Under article 33, a state of necessity was a circumstance precluding wrongfulness, which meant that the internationally wrongful act was never complete, whereas under paragraph 1 (*c*) of draft article 7 the standard of excessive onerousness was a limitation on an obligation to provide *restitutio* which would not arise in the absence of a complete internationally wrongful act.

70. Lastly, the topic of State responsibility had been in the Commission's programme of work for 40 years, including 9 years spent on considering part 2 of the draft. No less than 16 draft articles were now before the Drafting Committee, and more were to come. While there were good reasons for that state of affairs, it might nevertheless generate further criticism of the Commission. He was convinced, however, that, with the Special Rapporteur at the helm, the Commission would be able to make the vigorous effort required to achieve progress.

71. Mr. AL-KHASAWNEH expressed his appreciation to the Special Rapporteur for a meticulously researched and closely argued preliminary report (A/CN.4/416 and Add.1), which ranked alongside the reports of his predecessors.

72. With regard to method, he had no difficulty in accepting the Special Rapporteur's suggestion for separate

treatment of the consequences of international delicts and those of international crimes. Although such a distinction might result in delays and repetition, that would be offset by the greater precision that would ensue. The same was true of the Special Rapporteur's suggestion to devote part 3 of the draft exclusively to the settlement of disputes and, as a consequence, to incorporate the articles on "implementation" (*mise en oeuvre*) in part 2. In the final analysis, it was perhaps a question of legal taste rather than of an established technique, and it should not be forgotten that *de gustibus non disputandum est.*

73. The Special Rapporteur had referred to cessation as the "Cinderella" of the doctrine of the consequences of internationally wrongful acts (*ibid.*, para. 30), and a measure of the obscurity into which that Cinderella had fallen was to be gleaned from the preliminary report of the previous Special Rapporteur.[11] By 1984, however, it had emerged from obscurity to warrant inclusion in paragraph 1 (*a*) of draft article 6 as submitted by the previous Special Rapporteur, and the present Special Rapporteur had now decided to rescue that Cinderella completely with his proposal for a separate article. Personally, he agreed on the whole with that approach, which established a logical link between a specific remedy in part 2 and the corresponding category of wrongful acts in part 1. He noted in that connection that cessation had apparently been classified by Combacau and Alland under what they termed "obligations whose breach leads to a substitution of primary obligations".[12] If incorporating cessation in a separate article would enable more restricted categories to be distinguished, that was an added reason for supporting the Special Rapporteur's approach.

74. The scope of a wrongful act of a continuing character was, according to the Special Rapporteur's interpretation, quite wide. For instance, the Special Rapporteur said he disagreed with the Commission's stated view that, with regard to confiscation, "the act of the State as such ends as soon as the confiscation has taken place, even if its consequences are lasting" (*ibid.*, para. 34) and maintained that cessation was applicable in the case of both commissive and omissive wrongful acts, although he admitted that prevailing doctrine and practice did not support such an interpretation (*ibid.*, para. 42).

75. If the concept of a wrongful act of a continuing character was given a wide scope, the effect would be to make cessation and restitution overlap to such an extent that, despite treatment in separate articles, any distinction between the two would be artificial. That was borne out to some extent by the views of Balladore Pallieri and Dominicé (*ibid.*, para. 69), who had opined that *restitutio in integrum* was not one of the modes of reparation, and as such one of the facets of the new relationship coming into being as a consequence of the wrongful act, but rather a continuing "effect" of the original legal relationship. Although that was a minority view, it was not without force. Yet the Special Rapporteur went on to dismiss it with the words: "[That view], while helpful in preserving the notion that the original obligation (and the rule from which it originates) survives the violation, has a negative impact on the distinction between *restitutio in integrum* and cessation of the wrongful conduct" (*ibid.*, para. 70). And he added: "Cessation and restitution in kind should be maintained as two distinct remedies against the violation of international obligations." One was tempted to ask whether the distinction had become an end in itself.

76. Another drawback to giving wide scope to cessation was that it might confine another remedy—specific performance—to obscurity, for it seemed that, in the case of omissive acts of a continuing character, cessation was simply a misnomer for belated performance. He agreed on that point with Mr. Barboza (2102nd meeting).

77. A further consequence of an internationally wrongful act was nullity, which, like cessation, could be subsumed into *restitutio in integrum* but could also be set forth, with equal force, in a separate article. The scope of nullity was, of course, delimited by the requirement that the alleged wrongful act must be a juristic one, for example legislation, an executive order or a judicial decision. Its practical relevance had been succinctly described by Lauterpacht, who had stated that "the absence of more direct means of enforcement tends to endow the principle of nullity of illegal acts with particular importance in the international sphere".[13] That importance became still clearer if one bore in mind that the political organs of the United Nations, and in particular the Security Council, rarely discussed the question of demanding or fixing reparation when considering an internationally wrongful act. The Special Rapporteur had discussed nullity in his report, but the question remained whether, in view of its importance, that remedy should not be the subject of an express provision.

78. Turning to the question of restitution in kind, the Special Rapporteur rightly stated (A/CN.4/416 and Add.1, para. 64) that the approach to the concept was not uniform in either doctrine or practice. The *Bryan-Chamorro Treaty* case[14] was usually cited in support of the definition according to which restitution in kind consisted in re-establishing the *status quo ante*, while the classic dictum of the PCIJ in the *Chorzów Factory* case[15] was usually given in support of the definition according to which it consisted in establishing the situation which, in all probability, would have existed had the illegal act not been committed. The differences between the two definitions were more than academic, for they could have an impact on the assessment of damages and hence on the integrative aspect of the second definition. Although it was difficult to provide for a theoretical situation which had never existed, he none the less preferred the second definition.

79. In any event, no matter which definition was adopted philosophically, restitution in kind was always impossible —a fact of which the previous Special Rapporteur had been

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[11] *Yearbook . . . 1980*, vol. II (Part One), p. 107, document A/CN.4/330.

[12] *Loc. cit.* (2103rd meeting, footnote 5), pp. 97-98.

[13] H. Lauterpacht, *Recognition in International Law* (Cambridge, The University Press, 1947), p. 421.

[14] Republic of El Salvador *v.* Republic of Nicaragua, decision of 9 March 1917 of the Central American Court of Justice (see *The American Journal of International Law*, vol. II (1917), pp. 674 *et seq.*).

[15] See 2105th meeting, footnote 5.

fully aware, as was apparent from his preliminary report[16] —for time-reversal was beyond human capacity, or, as Omar Khayyam had said, "the moving finger writes and, having writ, moves on". It was therefore a wonder to find that writers were virtually unanimous in regarding it as the normal or primary right of the injured State. Of the authors cited by Mann in that connection,[17] only Brownlie seemed to regard it as "exceptional" and only Kelsen actually denied it. Nor was that primacy likely to be seriously challenged under the various legal systems. It was of course true that, as Mann had noted, restitution in kind was "largely unknown to the common law, which, in principle and somewhat paradoxically, adheres to the rule of Roman law *omnis condemnatio est pecuniaria*".[18] But the same author had pointed out that, "even in England, for instance, the plaintiff in an action for detinue is by no means confined to monetary relief, but is entitled to delivery-up of the chattel".[19] In Islamic law, the primacy of *restitutio in integrum* could be arrived at by necessary inference from the old rule *Idha batala-l-aslu yusaru ila-l-badal* (اذا بطل الأصل يصار الى البدل), meaning "If restoration of the original situation is impossible, seek an alternative". That rule had been codified in the Ottoman Civil Code as article 53. It was also worth noting that Islamic law referred to pecuniary compensation as "imperfect reparation", *al qada'ul nackis* (القضاء الناقص).

80. Recent trends in the literature, however, challenged not only the primacy, but also the availability of *restitutio in integrum*. Notable in that regard were two works by Christine Gray published in 1985 and 1987.[20] In those works the author had arrived at the conclusion, on the basis of a review of arbitral awards and decisions by the ICJ and other tribunals, that there was little if anything to support the primacy of *restitutio in integrum* in international arbitral practice and that the dictum in the *Chorzów Factory* case could not be relied upon to support a generally applicable theory to that effect. Without taking issue with that conclusion, he believed that the availability of other modes of reparation, the fact that courts and arbitrators worked in isolation and the fact that the latter rarely granted restitution without an express provision to that effect could equally be interpreted as supporting the primacy of *restitutio*. At any rate, he did not believe that the frequency of resort to other remedies challenged the primacy of *restitutio in integrum*.

81. Similar challenges to the primacy of *restitutio in integrum* emanated from the concept of special régimes. In that connection, he too considered that there was no need, for the time being, for a special régime for the treatment of aliens, although it was a matter that called for further study, especially in view of the fact that the Special Rapporteur had ascribed a large scope to cessation and at the same time did not provide for the exception of "excessive onerousness" in the case of cessation. An injured State would, under those circumstaces, opt for cessation rather than *restitutio in integrum*, and that constituted a gap in the Special Rapporteur's strategy. Ultimately, much would depend on the extent to which the Commission was willing to allow the content and—to use Combacau and Alland's term—the "extrinsic" value of the primary rules to determine the categorization of the secondary rules.

82. He wished to reserve his position on the concept of excessive onerousness as an exception to *restitutio in integrum*, which had been introduced by the Special Rapporteur in the light of the problem of nationalizations carried out in breach of international law.

83. Another problem was that of legal impossibility. While primary rules might, of course, expressly prescribe the consequences of their breach—as did article 50 of the European Convention on Human Rights[21]—he felt that no general conclusion could be reached as to the non-availability of *restitutio in integrum* on the basis of such examples, since they were the exception that proved the rule.

84. Finally, he supported the Special Rapporteur's conclusions (*ibid.*, paras. 109-112) concerning the right of choice of the injured State. Such a right no doubt existed, but the fact that it might lead to abuse if unlimited suggested that limitations should be placed upon it. A rich State might, for instance, pollute an international river to a level above that of appreciable harm. If the injured State or States were to accept pecuniary compensation in lieu of restitution, a situation of servitude would arise. Such cases should be borne in mind in drafting article 7, so as to ensure that limitations on the freedom of a State took account not only of the interests of other States, but also of the environment.

The meeting rose at 1.10 p.m.

[16] See *Yearbook . . . 1980*, vol. II (Part One), pp. 112-113, document A/CN.4/330, para. 29.

[17] F. A. Mann, "The consequences of an international wrong in international and municipal law", *The British Year Book of International Law, 1976-1977*, vol. 48, p. 3 and footnotes 6 and 7.

[18] *Ibid.*, p. 2.

[19] *Ibid.*, p. 3.

[20] C. D. Gray, "Is there an international law of remedies?", *The British Year Book of International Law, 1985*, vol. 56, p. 25; and *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987).

[21] See 2104th meeting, footnote 10.

2123rd MEETING

Thursday, 22 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (A/CN.4/412 and Add.1 and 2,[1] A/CN.4/421 and Add.1 and 2,[2] A/CN.4/L.431, sect. C, ILC (XLI)/Conf.Room Doc.4)

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

PART VI OF THE DRAFT ARTICLES

1. The CHAIRMAN invited the Special Rapporteur to introduce the first part of his fifth report on the topic (A/CN.4/421 and Add.1 and 2), namely chapter I on water-related hazards and dangers, which contained articles 22 and 23 of part VI of the draft, reading as follows:

PART VI

WATER-RELATED HAZARDS, DANGERS AND EMERGENCY SITUATIONS

Article 22. Water-related hazards, harmful conditions and other adverse effects

1. Watercourse States shall co-operate on an equitable basis in order to prevent or, as the case may be, mitigate water-related hazards, harmful conditions and other adverse effects such as floods, ice conditions, drainage problems, flow obstructions, siltation, erosion, salt-water intrusion, drought and desertification.

2. Steps to be taken by watercourse States in fulfilment of their obligations under paragraph 1 of this article include:

(*a*) the regular and timely exchange of any data and information that would assist in the prevention or mitigation of the problems referred to in paragraph 1;

(*b*) consultations concerning the planning and implementation of joint measures, both structural and non-structural, where such measures might be more effective than measures undertaken by watercourse States individually; and

(*c*) preparation of, and consultations concerning, studies of the efficacy of measures that have been taken.

3. Watercourse States shall take all measures necessary to ensure that activities under their jurisdiction or control that affect an international watercourse are so conducted as not to cause water-related hazards, harmful conditions and other adverse effects that result in appreciable harm to other watercourse States.

Article 23. Water-related dangers and emergency situations

1. A watercourse State shall, without delay and by the most expeditious means available, notify other, potentially affected States and relevant intergovernmental organizations of any water-related danger or emergency situation originating in its territory, or of which it has knowledge. The expression "water-related danger or emergency situation" includes those that are primarily natural, such as floods, and those that result from human activities, such as toxic chemical spills and other dangerous pollution incidents.

2. A watercourse State within whose territory a water-related danger or emergency situation originates shall immediately take all practical measures to prevent, neutralize or mitigate the danger or damage to other watercourse States resulting from the danger or emergency.

3. States in the area affected by a water-related danger or emergency situation, and the competent international organizations, shall co-operate in eliminating the causes and effects of the danger or situation and in preventing or minimizing harm therefrom, to the extent practicable under the circumstances.

4. In order to fulfil effectively their obligations under paragraph 3 of this article, watercourse States, together with other potentially affected States, shall jointly develop, promote and implement contingency plans for responding to water-related dangers or emergency situations.

2. Mr. McCAFFREY (Special Rapporteur) said that he would first make some general observations, then comment on chapter I of his fifth report (A/CN.4/421 and Add.1 and 2), which contained draft articles 22 and 23, and finally make a few remarks on the draft articles themselves.

3. His fifth report contained four draft articles covering three subtopics as set out in the outline which he had proposed in his fourth report (A/CN.4/412 and Add.1 and 2, para. 7) and which had met with general agreement in the Commission. In addition to articles 22 and 23, on water-related hazards and dangers, he was proposing, in chapters II and III of the report, articles 24 and 25 on the relationship between non-navigational and navigational uses and on the regulation of international watercourses, respectively. He suggested that the Commission focus its discussion on articles 22 and 23. He hoped, however, to introduce articles 24 and 25 briefly before the end of the session, so that members could take note of them and discuss them at the next session.

4. He intended to submit the remaining material on the topic at the next session. That would enable the Commission to complete the first reading of the draft articles before the end of its current term of office, assuming that progress of work in the Drafting Committee so permitted. There might also be an additional part on the settlement of disputes.

5. The part of the fifth report now before the Commission contained two draft articles provisionally numbered article 22 (Water-related hazards, harmful conditions and other adverse effects) and article 23 (Water-related dangers and emergency situations). The distinction between the problems dealt with in the two articles was essentially a matter of time-frame: those covered by article 22 were normally of an ongoing, chronic nature, while those addressed in article 23 usually took the form of calamitous events which gave rise to emergency situations. He would point out in that connection that article 23 was based on draft article 18 [19] (Pollution or environmental emergencies), which had been submitted to the Commission at its previous session[3] and dealt with only one category of emergency situations. A number of members of the Commission, as well as certain representatives in the Sixth Committee of the General Assembly, had supported the inclusion of that category in a broader context.

6. With regard to the subtopic under consideration, namely water-related hazards and dangers, it was very easy and tempting to become transfixed by such spectacular problems as floods and chemical spills and to lose sight of more chronic, and sometimes equally significant, problems such as those caused by ice conditions, siltation, erosion, droughts and desertification, which could contribute to or exacerbate catastrophic events.

7. In referring to floods and related problems, he would not discuss the question of pollution incidents, which had been considered at the previous session. The reason why floods had received more attention than other problems in treaties and generally in the work of international organizations was probably that they were the type of natural disaster that resulted in the greatest loss of life and most widespread destruction. The terrible losses recently caused by floods in Bangladesh were a particularly dramatic

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

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

[3] See *Yearbook . . . 1988*, vol. II (Part Two), p. 32, footnote 94.

example. The disaster in Bangladesh was, however, not an isolated one; it was the kind of event that had prompted the General Assembly, in 1987, to designate the 1990s as the International Decade for Natural Disaster Reduction, a decade in which the international community, under the auspices of the United Nations, would "pay special attention to fostering international co-operation in the field of natural disaster reduction".[4]

8. Although floods were only one kind of natural disaster, they did the greatest damage and their prevention or mitigation required a combination of measures such as forecasting, contingency planning, provision of early warning and the construction of physical works for the control of flood waters. At the same time, the tremendously increased capacity of humans to alter their physical environment had resulted in activities which also, directly or indirectly, caused flooding; that was the case, for example, with improper range management, deforestation and the construction of river embankments. In that connection, it would be noted that most of the international agreements surveyed in his fifth report (A/CN.4/421 and Add.1 and 2, paras. 18-53) seemed to assume that the causes of floods were entirely natural; by and large, they were confined to requiring the collection and exchange of information and the establishment of warning systems. Doubtless the parties to those treaties simply assumed that they were under an obligation not to undertake or permit any activities which would cause appreciable—and, in the case of flooding, serious and widespread—harm to the other party or parties. Nevertheless, human activity as a contributing cause of floods, as well as of many of the other problems dealt with in chapter I of the report, should not be ignored.

9. Other water-related hazards and adverse effects often dealt with in watercourse agreements were ice conditions, drainage problems, flow obstructions, siltation and erosion. Illustrations of treaty provisions addressing those problems were contained in the report (*ibid.*, paras. 31-53). In view of the limited time available, he would not go into each of those problems, but would merely say that many of them were often interrelated. For example, floods could be caused in part by siltation and, in turn, could cause erosion of river banks. The breaking up of ice-jams could also result in floods and could obstruct not only navigation, but also the normal flow of water.

10. The few relevant examples of diplomatic correspondence and official statements he had been able to discover (*ibid.*, paras. 54-65) revealed that States did not seem to disagree with the proposition that a State was under an international legal duty not to engage in conduct that would cause flooding damage, other similar damage or other adverse effects to another State or States.

11. The other authorities surveyed in the report also supported that principle. He would not go through that material at present, but was prepared to answer any questions in that connection. He noted, however, that, in his view, those authorities uniformly supported several fundamental principles: the duty to refrain from conduct that would cause or exacerbate conditions of the kind under consideration, when such conduct would result in appreciable harm in other watercourse States (which was really nothing more than a concrete application of the general rule contained in article 8 (Obligation not to cause appreciable harm) as provisionally adopted at the previous session[5]); the general obligation to co-operate with other watercourse States in preventing or mitigating water-related hazards and adverse effects; the obligation to warn other watercourse States of any known water-related danger or emergency situation; and the obligation of a watercourse State in whose territory a water-related danger or emergency situation originated to take, without delay, all feasible measures to eliminate or mitigate it and to prevent damage to other watercourse States. Many of the instruments and other authorities reviewed went much further than that, and none took a contrary position.

12. The other problems dealt with in chapter I of the report were salt-water intrusion (*ibid.*, paras. 105-108) and drought and desertification (*ibid.*, paras. 109-117). While those problems were no less serious—in fact, drought and desertification could be much more serious in the long run—the law governing them was not nearly so well developed. Except for the problem of salt-water intrusion, the applicability of the "no harm" rule was less clear in such cases. On the other hand, recent studies and intergovernmental meetings had stressed the importance of regional and international co-operation in combating problems of drought and desertification. The latter phenomenon was particularly alarming; it was estimated that 50,000 to 70,000 square kilometres of arable land were lost to "creeping desert" every year in Africa alone, and Asia and South America were also affected. Moreover, problems of drought and desertification were likely to become more severe in the future owing to the phenomenon of global warming; and they, in turn, contributed to the "greenhouse effect" by reducing the amount of vegetation that absorbed carbon dioxide.

13. Turning to the proposed articles, he said that the problems addressed in the report were dealt with according to the type of action to be taken by watercourse States, in other words according to whether they were problems of a chronic nature (art. 22) or conditions which gave rise to emergency situations (art. 23). The one exception was the case of floods, which were dealt with, expressly or by implication, in both articles, the reason being that, while floods did give rise to emergency situations, they could be prevented and mitigated only through long-term efforts involving co-operation and active collaboration between watercourse States. Since the articles and the comments accompanying them were self-explanatory, he would refer to them only briefly.

14. Paragraph 1 of draft article 22 set forth the general duty to co-operate with regard to water-related hazards, harmful conditions and other adverse effects, paragraph 2 defined the steps to be taken to fulfil that obligation and paragraph 3 set forth the obligation of watercourse States to ensure that activities under their jurisdiction or control did not cause water-related hazards, harmful conditions and other adverse effects that resulted in appreciable harm to other watercourse States. As stated in paragraph (3) of his comments on the article, co-operation "on an equitable basis" (para. 1) encompassed, in addition to the usual

[4] General Assembly resolution 42/169 of 11 December 1987, para. 3.

[5] *Yearbook . . . 1988*, vol. II (Part Two), p. 35.

communication of relevant information, the duty of an actually or potentially injured watercourse State to contribute to or provide appropriate compensation for protective measures taken, at least in part, for its benefit by another watercourse State. As indicated in paragraph (4) of the comments, moreover, article 22—in particular, its paragraphs 1 and 3—would apply to the harmful effects of water on activities not directly related to the watercourse. That was important because a flood could have effects outside the watercourse itself which it would be wrong to overlook.

15. The concept of "jurisdiction or control" (para. 3) as opposed to the concept of "territory" was discussed in paragraph (6) of the comments. Without completely dismissing the latter concept, he considered that the former, which was to be found in other draft articles prepared by the Commission and in the 1982 United Nations Convention on the Law of the Sea, was sufficiently well known to be warranted in the present context. Lastly, he explained that paragraph 3 of draft article 22 would apply, for example, to uses of land or water which led to such problems as flooding, siltation, erosion or flow obstruction; it was a concrete application of the rule embodied in article 8 as provisionally adopted.

16. Draft article 23, paragraph 1, stated what was perhaps the most fundamental obligation in the subtopic under consideration, namely prompt notification of any water-related danger or emergency situation to potentially affected States and relevant regional or international intergovernmental organizations, which were, as had been pointed out in the Commission and in the Sixth Committee, in a position to provide valuable services. As stated in paragraph 1, the expression "water-related danger or emergency situation" included both natural dangers and situations and those resulting from human activities. The Commission might wish to include a definition of that expression in the article on the use of terms.

17. Paragraph 2 provided that a watercourse State within whose territory a water-related danger or emergency situation originated was obliged immediately to take all practical measures to prevent, neutralize or mitigate the danger or damage; quite simply, that State was in the best position to do so. In many cases, however, the situation would be beyond its control and that was the reason for the "all practical measures" proviso.

18. Paragraph 3 required States in the area affected by a water-related danger or emergency situation to co-operate in eliminating the causes and effects of the danger or situation and in preventing or minimizing harm therefrom. As explained in paragraph (4) of his comments on article 23, the expression "States in the area affected" included, in addition to watercourse States, non-watercourse States that were, or might be, affected by a danger or emergency situation, as in the case of a coastal State that might be affected by pollution which originated in a watercourse State and found its way to the sea. The obligation embodied in paragraph 3 was essential, for it might well be that a watercourse State that was not severely affected was the only one that had the technological means required to remedy the emergency situation.

19. Paragraph 4 dealt with contingency plans and, like paragraph 3, was derived from article 199 of the 1982 United Nations Convention on the Law of the Sea. In paragraphs (5) and (6) of the comments, the Commission was invited to indicate whether it wished States benefiting from protective or other measures to be required to compensate third States that took such measures and whether article 23 should include a provision requiring a State affected by a disaster to accept the assistance offered to it and not to regard offers of assistance as interference in its internal affairs. Several of the publicists whose works he had cited in the report placed particular emphasis on the latter obligation, comparing it to the rights which international human rights instruments granted to citizens affected by danger.

20. In his report (A/CN.4/421 and Add.1 and 2, para. 5), he suggested that the Commission might wish to consider whether the draft articles should contain not only primary rules setting forth the obligations of watercourse States to warn, co-operate, mitigate and prevent, but also secondary rules specifying the consequences of the breach of those obligations. Clearly, the consequences of breaches of obligations relating to man-made water-related hazards and dangers would be more extensive than the consequences of breaches of obligations relating to purely natural water-related hazards and dangers. His own view was that the question should be left to the general field of State responsibility, the rules of which would be applied to water-related problems on a case-by-case basis. It would be helpful for the Commission to explore the question of secondary rules, but he feared that it might find itself on shaky ground, in an area where he had been unable to compile documents or materials on which to base a thorough discussion.

21. Mr. REUTER thanked the Special Rapporteur for his interesting introduction to his fifth report (A/CN.4/421 and Add.1 and 2), which was just as remarkable as the earlier ones, but which called for two general comments.

22. First, it was surprising that the Special Rapporteur seemed to agree with the view that the existence of a number of treaties with provisions that closely resembled one another created a customary rule of international law. He himself had serious reservations on that point and would warn the Commission against being too quick to generalize such a principle. Clearly, treaties were the principal instrument of international relations, but a customary rule was not formed simply because a number of treaties had the same provisions.

23. Secondly, with regard to the arbitral award in the *Lake Lanoux* case,[6] which was so often cited in reports and documents on strict liability, pollution and international watercourses, he noted that the arbitral tribunal had based its decision primarily on texts relating to that specific case, and, in its brief incursion into the area of general principles, it had drawn only negative conclusions. The tribunal had indicated in its findings that there was no rule in international law "which forbids a State, acting to protect its legitimate interests, from placing itself in a situation which enables it in fact, in violation of its international

[6] Original French text of the award in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068; and *International Law Reports, 1957* (London), vol. 24 (1961), pp. 101 *et seq.*

obligations, to do even serious injury to a neighbouring State".[7] Yet he wondered whether the tribunal would have adopted the same position if it had had to deliberate and rule following a disaster such as the one which had been caused by the bursting of a dam upstream from the town of Fréjus in France and in which there had been hundreds of victims. It was highly unlikely that, under international law at present, as it had developed since the *Lake Lanoux* award, a State could be said to have the right, in exercising its territorial sovereignty, to subject a neighbouring State to serious hazards.

24. Referring to draft articles 22 and 23 submitted by the Special Rapporteur, he welcomed the courageous step the Special Rapporteur had taken in reconsidering matters already dealt with in earlier articles. In introducing his report, the Special Rapporteur had said that the difference between the two articles was essentially temporal in nature, since article 22 dealt with ongoing situations and article 23 related to single events such as disasters. It was on the basis of that analysis that he had split the single article he had originally devoted to pollution into the texts now contained in articles 22 and 23 and he was to be commended on that initiative, for the members of the Commission must, in their capacity as jurists, try to identify the general features common to different situations instead of treating those situations individually and successively, although there was certainly much to be gained, from the technological and human-interest point of view, from a detailed examination of various types of water-related hazards and dangers.

25. He urged the Special Rapporteur to explain the meaning of the words "as the case may be" in paragraph 1 of article 22. Was he right in believing that those words referred to the material or physical circumstances of the case in question?

26. In the French text, the words *risques, conditions dommageables et autres effets préjudiciables provoqués par les eaux*, which formed the title of article 22 and were also used in paragraphs 1 and 3, were neither clear nor felicitous: but he could not judge the English text.

27. He would like to know what was meant by the expression "both structural and non-structural" in paragraph 2 (*b*). Was he correct in assuming that it referred to institutional or operational measures, in other words to measures which had some sort of legal or physical continuity? In paragraph 2 (*c*), the word "preparation" should be replaced by "pursuance", because it was to be hoped that studies of the efficacy of measures would be carried out before such measures were taken.

28. In paragraph 3, the Special Rapporteur had replaced the term "territory" by the words "jurisdiction or control", but had indicated that he was prepared to accept another formulation. If the term "jurisdiction" had the very general meaning it normally carried in English, he wondered whether the use of the term "control" was really necessary, but he would endorse any solution adopted by the Special Rapporteur. It was interesting to note, however, that the Special Rapporteur had retained the word "territory" in article 23, paragraph 2.

29. The Special Rapporteur's comments in his report on article 22, paragraph 3, appeared to be the written reflection of the general idea he had put forward in his oral introduction, when he had said—somewhat apprehensively—that it might be appropriate to consider the consequences of a "breach" as far as compensation or reparation were concerned. Yet there was no breach involved in the context of paragraph 3: it was simply a matter of requesting compensation *ex post facto* from a State because it had benefited from activities in which it had not taken part. The Commission thus had to decide whether the matter related to the topic of international liability or whether it should be studied under the present topic. Although he would not wish to decide the matter out of hand, he was in favour of the second approach, since the topic of international liability was much more general and it was often a good idea to proceed from the particular to the general. The Special Rapporteur might well ask which legal mechanism would come into play in such a situation and draw on internal law mechanisms, such as proceedings *in rem verso* and the various types of agency in common law.

30. In connection with article 23, the Special Rapporteur had asked whether the expression "emergency situation" should be defined. He would have no objection, but did not think that such a definition was necessary, since an emergency was an exceptional situation *per se* and what was exceptional could not be categorized.

31. In the reference to some types of pollution in paragraph 1, the word "immediately" should be added before the words "dangerous pollution incidents". The subject of the paragraph was, after all, the types of pollution that resulted in a disaster and precision was necessary in order to avoid reopening the debate on the question of pollution.

32. In paragraph 3, in which an obligation to co-operate was placed upon States, the Special Rapporteur used the phrase "States in the area affected", whereas, in paragraph 4, which spelled out the obligation more clearly, he used the phrase "watercourse States, together with other potentially affected States". He had no specific proposal to make, but thought that the concept of "the area affected" should be explained in greater detail.

33. In order to reply to the question raised by the Special Rapporteur in paragraph (5) of his comments on article 23, it would first be necessary to know whether the obligation to compensate would take effect before or after the danger had materialized or the disaster had occurred. In the first case, a compulsory measure of prevention would be required and he feared that it would give rise to problems. However, he fully agreed to the inclusion of a provision establishing an obligation to compensate that would take effect once the disaster had occurred, in accordance with the theory of agency or some similar concept.

34. Lastly, in reply to the question raised by the Special Rapporteur in paragraph (6) of his comments, he said he could agree that article 23 should expressly state that no offer of assistance could ever be regarded as interference in the internal affairs of the State to which it was made, but he did not believe that a State could be required to accept such assistance. An obligation of that kind would be contrary to the principle of sovereignty, to which States were still very much attached.

[7] Para. 9 (second subparagraph *in fine*) of the award (*Yearbook ... 1974*, vol. II (Part Two), p. 196, document A/5409, para. 1064).

35. Mr. CALERO RODRIGUES said that, while he fully understood that draft article 22 related to chronic or ongoing situations and draft article 23 to sudden occurrences, he did not think that the terms used were at all satisfactory, inasmuch as the first article referred to "hazards, harmful conditions and other adverse effects" and the second to "dangers and emergency situations". The concept of "emergency situations" was clear enough, but he would like further explanations on the relationship between "hazards" and "dangers".

36. Mr. MAHIOU, referring to the question raised in the fifth report (A/CN.4/421 and Add.1 and 2, para. 5) as to whether the draft articles should contain not only primary rules setting forth the obligations of watercourse States, but also secondary rules specifying the consequences of the breach of those obligations, said that the Special Rapporteur was touching on the problem of the overlapping between the topic under consideration and other topics with which the Commission was dealing. The issue was in fact whether rules on responsibility should be included in the draft articles on international watercourses or whether the draft should simply refer to the articles on State responsibility or those on international liability for injurious consequences arising out of acts not prohibited by international law.

37. It was also clear from the section of the report relating to studies by individual experts (*ibid.*, paras. 81-88) that those experts faced the same problem: they were trying to identify both the foundations and the content of State responsibility in that regard. That was the case, for example, of J. W. Samuels (*ibid.*, para. 81), who had referred to a threefold responsibility: the obligation to take preventive measures against natural disasters, the obligation to assist other States and the obligation to accept relief from other States. Was it appropriate, in the framework of the topic under consideration, to make provision for the specific consequences of State responsibility or should there simply be a reference, as he had just indicated, to strict liability and responsibility for wrongfulness? If there were consequences which pertained specifically to the topic under consideration and which might not be dealt with elsewhere, perhaps they should be stated in draft articles 22 and 23.

38. All the international watercourse agreements analysed by the Special Rapporteur (*ibid.*, paras. 18-53), which offered the advantage of illustrating relations between riparian States, appeared to be bilateral agreements and he wondered whether there were not any broader, multilateral, regional or continental agreements or conventions between river-basin countries. If there were any, how did they relate to bilateral conventions? In other words, should the régime of co-operation which was to apply in the situations covered by articles 22 and 23 be the sum total of the bilateral agreements or should it go beyond those agreements and constitute a multilateral system? Depending on the answer, the position would be very different, since co-operation between countries that were far away from each other necessarily took different forms from co-operation between neighbouring countries. The possibility of broadening the draft in that way therefore had to be considered in the light of whether it would be acceptable to States.

39. He welcomed paragraph 86 of the report, where the Special Rapporteur expressed his preferences through the writers he had cited. The approach he had adopted in drafting articles 22 and 23 was thus clearer. Such a presentation, which summarized the legal thinking on the subject in a few words, was very interesting, but he was not sure that it would lead to proposals that would be acceptable to all States.

40. In the report (*ibid.*, para. 104), the Special Rapporteur cited a passage from the *Lake Lanoux* arbitral award which stated that international law did not prohibit a State, "acting to protect its legitimate interests, from placing itself in a situation which enables it in fact, in violation of its international obligations, to do even serious injury to a neighbouring State". He had been concerned about the use of the words "even serious injury", but what Mr. Reuter had just said had allayed his fears. The protection of a State's interests, however legitimate, could in no case serve as a justification for that State causing injury—much less serious injury—to the interests of its neighbours. That development in case-law was reassuring.

41. With regard to the texts of draft articles 22 and 23, he noted that the title of article 22 mentioned only "hazards, harmful conditions and other adverse effects". Until now, however, reference had been made to "appreciable" harm, as in the title of article 8 as provisionally adopted at the previous session.[8] Although agreement had not yet been reached on the adjective to be used ("substantial", "considerable", etc. had also been suggested), it might be useful to include that qualification in article 22.

42. In paragraph 1 of article 22, the phrase "such as floods, ice conditions, drainage problems . . .", which qualified the expression "water-related . . . adverse effects", did not make it clear whether the list was exhaustive or not. If it was not exhaustive, the words "such as" should be replaced by "in particular".

43. In paragraph 2 (*b*), the meaning of the expression "both structural and non-structural" was by no means obvious. Those terms were used by economists and other technical experts, but what did they mean in legal parlance and, more precisely, in the context of the topic under consideration?

44. In paragraph 3, the Special Rapporteur had used the expression "jurisdiction or control" rather than the term "territory". He had explained why in paragraph (6) of his comments on article 22, but the arguments he had put forward were not as clear as they might be. Moreover, the example he had given would seem to point to the opposite conclusion. Article 22 dealt with phenomena whose territorial nature was indisputable: a river definitely formed part of the territory of a State, whereas, for example, the sea did not. Thus, although paragraph 3 was acceptable, the comments on it would have to be looked at again.

45. Turning to draft article 23, he said that he had doubts about the need to define "dangers and emergency situations", as was done in paragraph 1; if it were retained, however, that definition should be included in article 1, on the use of terms.

46. With regard to paragraphs 3 and 4 and the question raised by the Special Rapporteur in paragraph (6) of his comments on article 23, his own position was similar to that of Mr. Reuter: States had to be encouraged to accept

[8] See footnote 5 above.

relief assistance, but they should certainly not be compelled to do so. Perhaps, as a matter of caution, it would be advisable to add a safeguard clause which would be based on article 194, paragraph 4, of the 1982 United Nations Convention on the Law of the Sea and which might read:

> "In taking measures to prevent, reduce or control water-related hazards, dangers and emergency situations, watercourse States shall refrain from unjustifiable interference with activities carried on by other States in the exercise of their rights and in pursuance of their duties in conformity with the watercourse agreement."

47. The CHAIRMAN proposed that the Commission should adjourn to allow the Planning Group to meet.

It was so agreed.

The meeting rose at 11.35 a.m.

2124th MEETING

Friday, 23 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/412 and Add.1 and 2,[1] A/CN.4/421 and Add.1 and 2,[2] A/CN.4/L.431, sect. C, ILC(XLI)/Conf.Room Doc.4)

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART VI OF THE DRAFT ARTICLES:

ARTICLE 22 (Water-related hazards, harmful conditions and other adverse effects) *and*

ARTICLE 23 (Water-related dangers and emergency situations)[3] (*continued*)

1. Mr. McCAFFREY (Special Rapporteur) said that, to assist members in their further discussion of the topic, he wished to clarify two points that had been raised. The first concerned the expression "structural and non-structural" in paragraph 2 (*b*) of draft article 22, about which both Mr. Reuter and Mr. Mahiou (2123rd meeting) had expressed some doubts. What he had had in mind was simply consultations between watercourse States concerning physical structures such as dams and embankments that would help to alleviate the problem of flooding in particular. It had not been his intention to ascribe any more theoretical meaning to the expression. However, if it was considered to be confusing, some other expression could easily be found.

2. The second point concerned the term "hazards". While he had indeed said that draft article 22 was concerned with chronic situations and draft article 23 with emergency situations, he had also said that, under article 22, there was one exception, relating to floods or other calamities, that could be prevented by ongoing co-operation between watercourse States in the form, for instance, of study teams and the exchange of data and information. Perhaps one source of confusion was that the term "hazard" had been translated into French as *risque*, which was not felicitous. The Commission might therefore wish to find another term for "hazard" to convey the underlying idea more accurately.

3. He had, however, also used the term "hazard" in a second sense, namely in reference to accumulations of sediment which formed sandbanks in the middle of a channel and in reference to ice-floes or ice-jams which might not in themselves constitute an emergency situation such as to give rise to the obligations under article 23, but which none the less constituted a hazard to navigation and other uses of the water.

4. In short, under the terms of article 22, watercourse States were required to co-operate on measures to prevent such dangers as floods and serious drifting ice-floes, and to migitate the harmful effects thereof, possibly by the construction of appropriate works. Article 23, on the other hand, covered situations in which there was an actual or imminent emergency, in which event any State having knowledge of the emergency was required to warn other watercourse States in order to prevent any harmful effects. It was really a matter of a difference in the time-frame.

5. Mr. BENNOUNA extended his thanks to the Special Rapporteur for the exhaustive documentation presented on both the legal and the technical aspects of the topic. As was apparent from that documentation, the risk of disaster was evenly distributed throughout the world. Although the sombre picture painted by the Special Rapporteur was a source of pessimism, the solutions proposed contained elements of optimism.

6. After analysing the concept of hazards and dangers, the Special Rapporteur, in his fifth report (A/CN.4/421 and Add.1 and 2, para. 5), raised the very important question of the structure of the draft as a whole, suggesting that the Commission might wish to consider "whether the draft articles relating to this subtopic should contain not only primary rules setting forth the obligations of watercourse States, but also secondary rules specifying the consequences of the breach of those obligations". For his own part, he wished that that question could have been raised much earlier. If indeed it were decided to include secondary rules, those rules should apply not only to the part of the draft dealing with situations of danger and emergency situations, but to the draft as a whole. It was in the light of that consideration that the consequences of the choice to be made in that regard must be assessed.

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

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

[3] For the texts, see 2123rd meeting, para. 1.

7. The Commission was faced with three options. First, it could limit itself to the primary rules, as it apparently had done thus far, and not lay down obligations with regard to responsibility. That would involve an implied *renvoi* to the rules under the draft articles on State responsibility and on international liability for injurious consequences arising out of acts not prohibited by international law. Secondly, it could lay down a general principle of responsibility in the event of a breach of the primary rules, together with guidelines of a very general nature to temper that responsibility in the light of the rules and situations concerned, leaving it to States, courts and arbitrators to infer more specific rules therefrom. Thirdly, it could stipulate precisely the type of responsibility incurred for each case and each obligation.

8. Of the three options, he tended to favour the first or the second, since the Commission had to complete the first reading of the draft articles by 1991, and since entering into the problems of responsibility in any rigorous manner would be going a little too far. Also, the Commission's aim was to achieve as broad a draft as possible in order to cover very diverse situations, and it was anxious not to alarm States with rules that were too restrictive, for that might dissuade them from entering into a convention of a multilateral nature. If, therefore, the Commission was to remain within the context of a framework agreement and not to exceed its mandate, it should lay down a very general rule of responsibility along with fairly global guidelines. It would be helpful if, as had been suggested, the Special Rapporteur could produce a provision on responsibility by 1990 to test the feasibility of introducing a secondary norm into the draft.

9. The whole question depended on the way in which States would organize their co-operation, particularly in the special case of some fairly large-scale dangers and hazards. Such co-operation must have a well-defined objective. Wide-ranging phenomena such as that of global warming, referred to in the report (*ibid.*, para. 7), or phenomena connected with the environment in general, went beyond the purview of the riparian States of a given river and raised problems at another level which should be dealt with elsewhere. On the other hand, the question of floods (*ibid.*, paras. 9 *et seq.*) lay at the heart of the topic, being the archetype of a natural phenomenon that man had endeavoured to master throughout the centuries. In that connection, the Special Rapporteur affirmed that "One form of evidence of international custom is the appearance of similar provisions in a wide range of international agreements" (*ibid.*, para. 18). That was a somewhat bold statement which was, however, moderated by the fact that the Special Rapporteur used the words "one form of evidence" rather than "evidence". The matter was none the less far more complex. Not all practice and treaties had the same content and it could not therefore be said that there was an *opinio juris* relating to a precise obligation with respect to flood control. The Special Rapporteur had also cited (*ibid.*, footnote 39) a 1958 Memorandum of the United States Department of State according to which there were "principles limiting the power of States to use systems of international waters without regard to injurious effects on neighbouring States", but that was an extremely general remark which was already reflected in the obligation not to cause appreciable harm laid down in article 8 as provisionally adopted by the Commission at the previous session.[4] Again, the treaties which the Special Rapporteur cited were extremely varied and could not be said to reveal a consistent practice on which international custom could be founded. In any event, disaster control was more a matter of progressive development of the law than of custom.

10. With regard to practice in general, greater account should be taken of the work done by the United Nations in preparation for the International Decade for Natural Disaster Reduction. A group of experts which had been appointed in that connection had already met twice, in Morocco and Japan, and was expected to submit its report to the Secretary-General before the next session of the General Assembly. Useful information for the purposes of the present topic was to be gleaned from that United Nations action.

11. It was clear that there was a growing feeling of interdependence and world solidarity in combating natural disasters. In that connection, the Special Rapporteur, in his summary of the relevant literature, had noted that reference had been made, in the context of what certain authors had termed the "third generation of human rights", to two types of obligation, one being the obligation to aid another State afflicted by a natural disaster and the other being the obligation of the afflicted State to receive aid. The same writers deplored the reluctance of certain countries to call upon external aid to deal with natural disasters. Although such ideas fell outside the strict purview of the law, they could fertilize and promote the development of the law.

12. Draft article 22 was concerned with measures that were not of an immediately urgent nature, since they applied to the period prior to the occurrence of a disaster. The article therefore served no purpose, as it added nothing to what had already been provided for elsewhere in the draft. On the other hand, draft article 23 concerned disasters that had actually occurred and was fully justified. The most interesting point about the article was that it provided for contingency plans which must be elaborated and, in the event of a disaster, implemented as quickly as possible with international assistance. He would have liked that particular provision, however, to be developed further and possibly to be a little more restrictive.

13. The Special Rapporteur raised two questions in paragraphs (5) and (6) of his comments on article 23. The first concerned compensation by States benefiting from measures of protection adopted by other States. Such compensation could indeed be envisaged, provided that it was based on the principle of equitable distribution, as suggested by the Special Rapporteur himself. A problem akin to the private-law notion of unjust enrichment was, after all, involved.

14. The second question was more important and raised philosophical problems that went beyond the law, concerning as it did the duty to intervene for the purpose of providing assistance. It was a notion that smacked somewhat of humanitarian intervention and might be suspect on that ground, since humanitarian intervention had been used throughout the nineteenth century as a pretext for all kinds of violations of the sovereignty of small countries. In the present instance, however, a more disinterested phenomenon was involved, and one to which there were two aspects:

[4] *Yearbook . . . 1988*, vol. II (Part Two), p. 35.

the duty of assistance, and the obligation to accept such assistance. There was no problem with regard to the first aspect and, in his opinion, the only modality required for the time being was an international organ of a universal character or a regional organization or institution. Yet it would be desirable as an extension to the future instrument if provision could be made for a highly flexible institution to implement the contingency plans required under article 23. On the other hand, he did not think that an obligation to accept external assistance could be imposed on a country, although it was obviously immoral not to accept such assistance in order to alleviate the sufferings of the population. The most that could be done was perhaps to provide that any refusal must be accompanied by a statement of the reasons or, conceivably, that the State due to receive the assistance could require that it be channelled through an international organization so as to avoid any pressures that might be linked to bilateral aid.

15. Lastly, he trusted that the Special Rapporteur would abide by his undertaking to provide the Commission with all the remaining elements for consideration of the topic by the following session, so that the draft could be finalized before the end of its current term of office.

16. Mr. AL-QAYSI paid tribute to the Special Rapporteur for his well-documented fifth report (A/CN.4/421 and Add.1 and 2), which contained a wealth of technical material.

17. He agreed with the Special Rapporteur's statement that

> there is a continuum of possibilities, ranging from the wholly natural hazard or disaster at one end to that which is entirely man-made at the other. The legal régimes of prevention, mitigation and reparation should therefore take into account not only the nature of the disaster . . . but also the degree to which human intervention contributes to harmful consequences. (*Ibid.*, para. 4.)

He had not, however, been able to arrive at any firm conclusion on the question posed by the Special Rapporteur (*ibid.*, para. 5) as to whether the draft articles should contain secondary as well as primary rules. The catastrophic nature of the occurrences the draft sought to regulate might militate in favour of the inclusion of secondary rules without the need to wait for the outcome of the Commission's work on two other relevant topics: State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. An integrated approach to the present topic might, moreover, be desirable. On the other hand, the effect might be to introduce an element of imbalance between the various parts of the draft, and it might run counter to the basic conception of a framework agreement laying down primary rules designed to encourage watercourse States to conclude more detailed agreements. The Commission would perhaps be in a better position to respond if the Special Rapporteur were to clarify the scope and substance of the secondary rules involved.

18. In the interests of clarity, paragraph 3 of draft article 22 needed to be fleshed out so far as the object of appreciable harm was concerned. Surely what was meant was appreciable harm to watercourse States in connection with the use of a watercourse. If that point were not made explicit, the scope of the article would go far beyond the topic: indeed, the Special Rapporteur admitted as much in his comments on the article (para. (6) *in fine*). Like Mr. Reuter (2123rd meeting), he wondered why the expression "jurisdiction or control" was used in article 22, while the term "territory" appeared in article 23: the explanation given by the Special Rapporteur in paragraph (6) of his comments was not entirely convincing.

19. As to draft article 23, which was based on draft article 18 [19], on pollution or environmental emergencies, submitted at the previous session,[5] it would be preferable to align the second sentence of paragraph 1 more closely with the substance of draft article 18, paragraph 1, which had sought to define the emergencies in question more clearly. Another possibility would be to include a definition of water-related dangers and emergency situations in the article or the use of terms, and then to modify the second sentence of paragraph 1 accordingly. Actually, he would favour the second alternative.

20. With regard to the suggestion referred to in paragraph (5) of the comments on article 23, he could not accept placing an obligation on States benefiting from protective or other measures to compensate third States for the measures taken, unless a provision requiring contribution on an equitable basis were introduced. Lastly, he had no particular views on the question raised in paragraph (6) of the comments, because the reason for the suggestion had not been adequately explained, apart from the fact that several commentators had highlighted the issue.

21. Mr. NJENGA thanked the Special Rapporteur for a scholarly yet realistic analysis that made it possible for the Commission to see the light at the end of the tunnel on a topic whose finalization had formerly appeared so elusive. It would be helpful if all of the draft articles so far submitted, including the latest ones, were reproduced in a single document to enable members to see the amount of ground covered up to now. He fully endorsed draft articles 22 and 23, and his comments were intended not as criticism, but simply as encouragement to the Special Rapporteur.

22. The fifth report (A/CN.4/421 and Add.1 and 2) represented a determined effort to concretize the obligation of States, particularly States sharing watercourses, to co-operate to their mutual benefit. The imperative need for co-operation in the exploitation of the international "commons" and the environment, not only among States but also between States and competent international organizations, had never been as great as at present, when such exploitation was fast approaching the maximum sustainable level. The report of the World Commission on Environment and Development (*ibid.*, para. 78) and the report of that Commission's Experts Group on Environmental Law, entitled *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (*ibid.*, para. 79), amply demonstrated the need for a general obligation to co-operate in the collection and dissemination of data. That obligation also covered the provision of pertinent information to other States concerned in order to prevent or minimize transboundary harm, whether occasioned by emergency situations or by other activities with the potential to create appreciable harm. As the Special Rapporteur pointed out (*ibid.*, para. 80), intergovernmental and international non-governmental organizations alike recognized the need for co-operation, and indeed for collaboration, in preventing and mitigating water-related hazards and dangers. The global warming effect and the depletion of the ozone layer also attested to the need for co-operation in environmental matters.

[5] *Ibid.*, p. 32, footnote 94.

23. In his report, the Special Rapporteur referred to many pertinent observations made in studies by individual experts, but one must not be carried away by the enthusiasm of such experts. It was difficult to agree with E. Brown Weiss (*ibid.*, para. 81) that customary international law now recognized the "duty to minimize environmental injury by giving prompt notification, providing information, and co-operating in minimizing injury" and that "there appears to be a consensus that under international law breaches of obligations . . . to prevent accidents and to minimize damage incur responsibility for resulting injuries". International co-operation should not be viewed from the standpoint of duties and rights of States but rather in the context of the obligations of States based on good-neighbourly relations. That approach was borne out by the examples of bilateral and multilateral arrangements or co-operation agreements among States sharing river basins on planning, policy-making and implementation cited by the Special Rapporteur in his report. Certainly, that was the African experience, as demonstrated by the paper prepared by R. D. Hayton for the Interregional Meeting on River and Lake Basin Development with Emphasis on the Africa Region, in October 1988 (*ibid.*, para. 83).

24. As the Special Rapporteur noted (*ibid.*, para. 86), the general duty to prevent or minimize injury included the obligations to exchange information relating to conditions bearing on the problem involved; to enter into consultations, on request, with potentially affected States in order to establish safety measures; to afford prompt notification of dangers; and to co-operate in the mitigation of damage. The relevance in that context of the obligation not to cause appreciable harm already reflected in article 8 as provisionally adopted at the previous session[6] had been rightly emphasized.

25. On the subject of the judicial decisions and arbitral awards cited in the report (*ibid.*, paras. 89 *et seq.*), it should be noted that the prevailing tendency to quote *obiter dicta* in support of a given point of view, while ignoring the essence of the decisions, had recently been criticized by Sir Robert Jennings at a meeting organized by the Netherlands Institute for the Law of the Sea. The criticism had been levelled at international law conferences and the ICJ, but it could very well have been directed at the Commission. It was not possible to recall offhand the number of times the *Corfu Channel* case, the *Lake Lanoux* arbitration, the *Trail Smelter* arbitration and the *North Sea Continental Shelf* cases had been cited in support of a particular point of view. Yet each of those cases dealt with a very specific issue. While the importance of general pronouncements made in connection with such judgments or awards must not be underestimated, there was call for caution regarding the extent to which they could be considered as statements of general customary law: they merely constituted evidence of emerging principles of international law.

26. He greatly appreciated the Special Rapporteur's useful comments on other water-related problems and conditions (*ibid.*, paras. 105 *et seq.*), with special reference to salt-water intrusion and to drought and desertification. Although the entire international community faced those problems, it was the third world, and especially Africa, that experienced them most acutely, owing to the lack of the necessary infrastructure and resources to deal with them. One could not fail to agree with the Special Rapporteur's conclusion that the draft should cover salt-water intrusion and drought and desertification, particularly in relation to regional and international co-operation.

27. As he had already said, he fully endorsed draft articles 22 and 23 on water-related hazards, dangers and emergency situations. Article 22, which dealt with co-operation in handling a number of hazards, contained a list, namely floods, ice conditions, drainage problems, flow obstructions, siltation, erosion, salt-water intrusion, drought and desertification. Presumably, the list was not intended to be exhaustive, and the obligation to co-operate would extend to other water-related hazards, including water-borne diseases such as river blindness. He would like clarification of the expression "structural and non-structural" in paragraph 2 (*b*), and did not think that Mr. Reuter's suggestion (2123rd meeting, para. 27) to modify paragraph 2 (*c*) to read "pursuance of . . .", rather than "preparation of . . .", would be an improvement in English.

28. In article 23, he would propose that the scope be widened to encompass not only watercourse States and intergovernmental organizations, but also other States that might have relevant information on water-related dangers or emergency situations. Countries which possessed modern technology and, more particularly, made use of satellites could obtain information on impending disasters such as floods, earthquakes and hurricanes well before many watercourse States could. Information of that kind should be promptly communicated to all States likely to be affected.

29. The suggestion made in the Sixth Committee of the General Assembly that States benefiting from protective or other measures should be required to compensate third States for such measures was acceptable, but it would be better to require contribution in an equitable manner, rather than compensation. He could agree to a formulation along those lines, as suggested by the Special Rapporteur in his comments on article 23 (para. (5)).

30. Lastly, he supported the idea of including a provision requiring or encouraging a State affected by a disaster to accept the assistance proffered if it did not have adequate means to respond to an emergency or disaster. The generous international assistance given to Ethiopia and other African countries in the recent drought and famine had been appreciated throughout the African continent. Other instances of such international assistance had been for the devastating hurricane in Jamaica, the severe earthquake in Armenia and the large-scale flooding in Bangladesh. Such a provision would be akin to the principle that was well established in refugee law, namely that granting asylum was neither a hostile act nor interference in the internal affairs of the country of origin.

31. Mr. TOMUSCHAT said that the Special Rapporteur had made the Commission's task easy and difficult at the same time: easy, because he had so scrupulously identified and detailed the source materials on which he had drawn, and difficult because he had made it hard to disagree with him. The Commission was now on the right track and might well be able to complete its consideration of the set of draft articles on first reading.

[6] See footnote 4 above.

32. The source materials proved that the Special Rapporteur was on safe ground in his treatment of the new draft articles 22 and 23, although he had not been entirely successful in showing that the relevant rules must be considered as having acquired the force of customary international law. However, the Commission's task comprised the progressive development of international law, and it could not ignore general trends in recent international agreements or other instruments on watercourses. Most of what the articles set forth was practically self-evident: even someone with no experience in international watercourse law, using only logic or common sense as his or her main tool, would have come to similar conclusions. He certainly did not mean by that that the proposals were trivial. Yet even if they were, the most basic requirements of natural justice often seemed trivial from a conceptual point of view, although that in no way diminished their intrinsic importance.

33. With regard to article 22, he would prefer to put the duty of prevention, now set out in paragraph 3, at the beginning. In an international treaty, the primary element remained the individual obligation of each of the contracting parties. It was only on the basis of that specific duty of prevention that the duty of co-operation arose. Co-operating with other States with a view to preventing or mitigating water-related hazards was but one method of discharging the general duty of prevention that formed the substance of the article. Individual action still took precedence over collective action, even in the present day, when forms of collective action were developing at an increasingly rapid pace.

34. He did not agree with Mr. Bennouna that article 22 was not useful because it merely repeated the terms of article 8 (Obligation not to cause appreciable harm) as provisionally adopted at the previous session.[7] Article 8 covered only the uses of watercourses, whereas draft articles 22 and 23 set forth a general duty to prevent certain harmful effects: even if a State did not use a watercourse, it must take action to prevent such harmful effects. Article 22 thus elaborated on article 8 and was broader in scope. Furthermore, there was no inherent drawback in repetition: the general obligation to provide data and information set out in article 10, for example, was repeated in a specific context in article 11.[8]

35. He objected to the word "problems" in paragraph 2 (*a*) of article 22 because the subparagraph referred back to natural occurrences or phenomena listed in paragraph 1 which, by a value judgment, could be qualified as "hazards". That raised a drafting point relating to paragraph 1: could a flood be called an "adverse effect"? He would prefer the list of key concepts to be modified by using the word "hazards" alone, as the mention of "harmful conditions" and "adverse effects" added nothing to the substance of the provision and failed to make it more precise.

36. The expression "structural and non-structural", in paragraph 2 (*b*), needed further explanation, and he wondered whether it was really necessary to include the phrase "where such measures might be more effective than measures undertaken by watercourse States individually". Again, paragraph 2 (*c*) should be made more concise. He understood it to refer to an assessment of the measures and strategies employed within the framework of mutual co-operation. The examples of possible forms of co-operation in those provisions were, of course, useful, in that they created a certain awareness of what steps might be taken to give concrete shape to co-operation.

37. The Special Rapporteur's assertion in paragraph (3) of his comments on article 22 about the duty of an actually or potentially injured watercourse State to provide compensation for protective measures seemed much too general. It might well be that such an obligation arose under specific circumstances, but that could not be the normal situation, since the "source State" would be under a general duty of prevention in accordance with the articles.

38. He agreed with other members that article 23 should identify its specific object more precisely. Simplifying the title to "Emergency situations" might be an improvement, or a definition might be incorporated in the article on the use of terms.

39. Paragraph 3 of article 23 raised an interesting legal point: could a convention, which might be accessible only to States, enjoin international organizations to co-operate in trying to overcome an emergency situation? In strictly legal terms, an international organization was an independent subject of international law. It might therefore be advisable to use the word "should" in relation to such organizations.

40. He did not think that such general reservation clauses as "to the extent practicable under the circumstances", also in paragraph 3, needed to be used. It was perfectly clear that the duty of co-operation had inherent limitations. Whenever international law set forth an obligation to take positive action, that obligation was to be understood not as absolute, but as conditioned by a standard of reasonableness. Since combating emergency situations was in the mutual interests of the States concerned, it was their own well-being that they were promoting, and practicability constituted a natural limitation on what they might be required to do, in line with the concept of due diligence.

41. With regard to the question raised in the fifth report (A/CN.4/421 and Add.1 and 2, para. 5) as to the possibility of including both primary and secondary rules, he agreed with Mr. Al-Qaysi that no general answer could be given at the present juncture. Once all the substantive articles were before the Commission, it might draw distinctions if it considered that certain obligations under the draft went so far that some limitation of the consequences of their breach would be appropriate. The idea of an international watercourse authority mentioned by Mr. Bennouna was an ideal, but it was not a viable prospect. Watercourse authorities might be desirable on a regional basis, but would be too cumbersome at the broader international level.

42. Mr. Sreenivasa RAO congratulated the Special Rapporteur on his thought-provoking fifth report (A/CN.4/421 and Add.1 and 2), which, besides being highly stimulating, was also eminently readable. The broad sweep with which the Special Rapporteur had tackled his difficult topic

[7] See footnote 4 above.

[8] For the texts of articles 10 and 11, provisionally adopted by the Commission at its previous session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 43 and 45.

was welcome; the overall perspective needed in order to encompass such factors as global warming, the "greenhouse effect", etc. was much in evidence, and the sense of idealism which permeated the text was to be commended. He sympathized with the Special Rapporteur's desire to broaden the scope of the duties of States in establishing international co-operation mechanisms and rendering assistance to the victims of emergency situations. Nevertheless, there were a number of questions of both a general and a more specific nature.

43. First, he wondered to what extent the series of bilateral treaties cited in the report in connection with floods and related problems could be regarded as indicative of principles of international law. Treaties were, by their very nature, binding only on the parties and could never impose obligations on non-parties. A great deal of caution had to be exercised in drawing conclusions as to their role in customary international law. Of course, where non-party States had drawn upon existing treaties in their mutual relations, the practices which thus evolved represented additions to an *opinio juris* and contributed to the development of customary international law. Without discounting that possibility, he none the less questioned whether it was really necessary for the Commission to concern itself with all the numerous existing treaties in the field under consideration.

44. The second general question was whether, and to what extent, all the materials cited in the report were relevant to the draft articles submitted by the Special Rapporteur. In his view, rather than reflecting faithfully the principles enunciated in the treaties, declarations, resolutions and recommendations referred to in the report, the articles were a projection of the Special Rapporteur's personal preference for a more absolutist régime. For example, two of the treaties cited on the subject of providing early warning of flood danger (*ibid.*, para. 21) employed the phrase "as far in advance as practicable" in connection with the information to be communicated, yet no similar emphasis on practicability was to be found in the articles before the Commission. Similarly, all the recommendations by the intergovernmental organizations mentioned were unanimous in placing emphasis on institutional mechanisms for prevention, planning and co-operation.

45. The lesson to be drawn from the experience of many countries was that no State could deal with massive disaster situations unaided; a global response was needed, not only from other Governments but also from private sources such as industrial and trade circles and from science and technology. If that was true of relatively simple problems caused by transboundary flooding, how much more would it apply to the effects of global warming, rain-forest deforestation or the "greenhouse effect"? A balanced approach was called for; each of those factors had to be considered separately, instead of being lumped together for the purposes of establishing liability. For example, certain patterns of land and water use were not only traditional but, in some cases, inevitable because of population growth or rapid industrialization. Governments were sometimes obliged by practical necessity to cut down trees or occupy flood-plains. It would be wrong, in such cases, to apportion blame to the countries concerned. All the international community could do was to try to provide an institutional framework for international assistance and for co-operative and educational measures. A full understanding of the problem required closer and more thoughtful consideration of all of the factors involved.

46. He did not wish to suggest that countries should not be held responsible for acts which they wilfully committed in full knowledge of the possible harmful effects on neighbouring or other countries. In the presence of clear proof of a direct causal link between an activity conducted in one State and harmful effects suffered in another, a situation of liability clearly existed. Without trying to undermine that concept in any way, he merely wished to advocate caution in less straightforward cases where a multiplicity of factors and traditional patterns of behaviour might be involved. There again, the main emphasis should be placed on international co-operation and assistance and on the institutionalization of preventive measures and contingency plans. The Special Rapporteur's report itself was more circumspect and moderate in that respect than the proposed articles.

47. Considerations of humanity were cited in the report (*ibid.*, paras. 90-91) as one of the basic foundations for drawing certain conclusions from the judgments of the ICJ in the *Corfu Channel* case and the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*. Those judgments did not, in his opinion, offer very useful guidance in the present context. Nor did he see the logic of invoking considerations of humanity in connection with floods and other natural disasters, rather than with more fundamental problems such as poverty, disease and hunger or with principles of international trade. Practical realities did not allow practical conclusions to be drawn from principles of so-called "soft law". While he personally would greatly welcome the development of such doctrines, he doubted whether, until the advent of a more enlightened world, they could be applied to specific situations. Similarly, it seemed far-fetched to introduce human rights issues into the consideration of the present topic.

48. Turning to the draft articles themselves, he would prefer the words "on an equitable basis" to be omitted from paragraph 1 of article 22. In cases where the watercourse States concerned had attained different levels of development, it seemed to go without saying that they would co-operate in the light of their respective capabilities; there was no need to introduce a legal rule to that effect and, moreover, no such provision was to be found in the materials surveyed in the report.

49. The words "all measures", in paragraph 3, were an instance of the absolutist approach he had referred to earlier. The expression "all practicable measures" would appear to be more appropriate and less hard on watercourse States, which, as the text read at present, would be required to prove that they had done everything possible not to cause a disaster. As a general comment in that connection, he would remark that the Special Rapporteur was evidently trying to reconcile two diametrically opposed concerns, that of bringing to account watercourse States which engaged in harmful activities and that of encouraging co-operation in the longer term. From that point of view, too, a reference to "all practicable measures" was to be recommended.

50. The phrase "under their jurisdiction or control", also in paragraph 3, could be shortened to "under their

jurisdiction", for "control" added nothing to the meaning of "jurisdiction" if the two terms were to be taken together. If, on the other hand, the intention was to treat "jurisdiction" and "control" as alternatives, the result would not be very helpful: it was difficult to accept the notion of control without jurisdiction.

51. He was not altogether satisfied with the idea, in the same paragraph, that watercourse States should ensure that their activities were "so conducted as not to cause water-related hazards . . .", a form of language that seemed to place an unduly heavy burden on watercourse States. It could be taken to mean, for example, that a State should not allow its population to expand unduly and thereby bring about some undesirable effects. Article 22 should not impose on States responsibilities which they could not discharge. Accordingly, the words in question should be replaced by "so conducted as to prevent, mitigate and, as far as possible, not to cause water-related hazards. . .". A formulation of that kind would not place States in an impossible situation and would ensure broader acceptance of the draft.

52. The reference in paragraph 1 of draft article 23 to "potentially" affected States posed some difficulty. The term certainly stood in need of clarification. In certain situations, such as floods, the meaning of "potentially affected States" would be fairly clear. In others, such as that of the effects of deforestation, it would be difficult to determine which States were likely to be affected. The test would, of course, be impossible to apply with regard to such phenomena as global warming or the "greenhouse effect". As far as watercourses were concerned, it would be remembered that a lengthy debate had taken place on the subject at the previous session: where waters flowed into an ocean, carrying pollution with them, the number of potentially affected States would be great and there might be uncertainty in identifying them. He also had doubts about the words "or of which it has knowledge", in the same paragraph. A country like the United States of America had, with the aid of its satellites, knowledge of much that was going on all over the world. It was questionable whether, in that situation, the State concerned could be said to have a legal obligation to inform other States. His own preference would be for the issue to be treated as a matter of co-operation, and not one of legal obligation.

53. In paragraph (5) of his comments on article 23, the Special Rapporteur referred to a suggestion made in the Sixth Committee of the General Assembly that States benefiting from protective or other measures should be required to compensate third States for the measures taken, adding that he had no objection in principle so long as the contribution was to be only on an equitable basis. His own preference would be for a more balanced approach based on the concept of mutual reimbursement. In paragraph (6) of the comments, the Special Rapporteur invited the Commission to consider whether a provision should be included requiring a State affected by a disaster to accept proffered assistance and not to regard offers thereof as interference in its internal affairs. Clearly, no State could be forced to accept assistance. Bearing in mind the fact that the assistance offered in cases of drought or famine often had strings attached, the right of the State concerned to decide whether or not to accept it should be preserved.

54. Mr. BEESLEY commended the Special Rapporteur's clarity of thought and deep scholarship, so evident in his fifth report (A/CN.4/421 and Add.1 and 2).

55. There had been some unjust criticism of the Special Rapporteur for relying largely on the contents of bilateral agreements. The fact was, however, that most of the problems relating to international watercourses were bilateral problems which were solved by bilateral treaties. As far as the present topic was concerned, they were in practice the main sources available. Similar criticisms had been voiced of the Special Rapporteur's reliance on the decisions of tribunals as evidence of State practice. However, one could not ignore those decisions, even if some of them had not commanded unanimous approval. Whether those decisions reflected customary law was another matter, but at the very least they were relevant for the common threads of State practice that could be found in them. He himself was accustomed to taking tribunals seriously, and in his experience what was enunciated as a general principle of law usually reflected such principles or led to their acceptance. In the absence of some more authoritative ruling, for example by the ICJ, tribunal decisions in bilateral disputes constituted the best source for the substance of the draft articles.

56. The important point, however, was that the principles reflected in draft articles 22 and 23 did not conflict with the provisions of any bilateral agreement or with the rulings of arbitral tribunals. He himself did not experience any difficulty with the substance and common-sense approach of those articles, although his remarks on that point, as well as on others, were conditional on the question of the ultimate purpose of the draft articles, a question on which he had an open mind. As far as he knew, the Commission had not yet decided whether the outcome of the draft should be a residual agreement, an umbrella agreement or a framework agreement. The Special Rapporteur's reports indicated in any case that the final draft would not emerge as a proposal for an instrument intended to legislate hard and fast law for all of mankind. Since its intended purpose would be more to provide guidelines for States, the text need not spell out each and every situation. Thus there was a marked difference between the present topic and that of international liability for injurious consequences arising out of acts not prohibited by international law, the draft articles on which were framed in a legislative mode.

57. Opinion had been divided as to whether liability under the present topic should be based on harm or on risk, but no one in either school of thought had attacked the substance of the draft articles. On the contrary, he saw a convergence of both schools on the issue of preventive measures. In that connection, he was not wedded to the formula in paragraph 1 of article 22 to the effect that co-operation with regard to preventive measures should be "on an equitable basis", although co-operation on an equitable basis was certainly preferable to co-operation on an inequitable basis. There was, in fact, some jurisprudence in support of the formula "on an equitable basis".

58. The reference to "all measures", in paragraph 3, should be retained, since it was better than a weaker formulation such as "most measures" or "some measures". The same was true of "all measures necessary", as compared with "all practicable measures".

59. The use of the term "potentially" before "affected States" in paragraph 1 of article 23 had attracted some criticism. For his part, he could think of no better expression than "potentially affected States". It was essential not to exclude any State which might be affected in the future, and not to wait until disaster struck before acting. It was true, however, as Mr. Sreenivasa Rao had pointed out, that in the case of certain phenomena virtually the whole of the world was potentially affected. Clearly, the only solution was to adopt a common-sense approach to the application of the rule in question. The form of language employed in article 23 should be examined further, but the underlying approach was very well founded.

60. In that respect, it was interesting to note the remark made by Jan Schneider in her 1979 book[9] postulating "the right of all people in present and future generations . . . to freedom, equality and adequate conditions of life in an environment that permits a life of dignity and well-being". That passage described a conceptual framework which clarified the human rights of mankind in a co-operative and effective law of the environment. For Schneider, that law had both ecological and human rights dimensions. Personally, he tended to see all the branches of the law in question converging on what was increasingly a human rights dimension. The matter called for a holistic, interdisciplinary approach if the problems were to be solved.

61. Some brief comments could be made on the doctrine which based liability solely on risk, and which he would call the "riskability doctrine". If the Special Rapporteur had eliminated all liability based on harm or damage, and had founded liability solely on risk, he would probably have come up with very similar provisions. For his own part, he could agree to risk being taken into account for such matters as prevention, but he had difficulties with any more general "riskability" approach. No one suggested that there should be compensation for an event before it occurred; in other words, the riskability doctrine was based on retroactive recognition of the risk. When an event did occur, it was then concluded that there had been a risk beforehand. Thus it was argued that risk was not predictable and yet that it was measurable—an idea that was somewhat confusing. At the same time, the concept of risk had the advantage of being applicable both to continuing events and to single events. Another difficulty arose in that connection: if the risk was not predictable, how was it possible to determine what to do to prevent it? In the case of someone suffering death, for example, it was difficult to see the use of a retroactive appreciation of the *risk* of death—what was done could hardly be undone. Obviously, the risk approach called for more scrutiny; if adopted, it should be viewed as progressive development, rather than codification, of the law. Risk seemingly involved no legal consequences until the actual event occurred, "event" being used as a neutral term carrying no connotation of fault. For his part, he believed that activities clearly creating a heavy risk should perhaps not be allowed to happen at all. One problem, of course, was who would act as the judge. Engineers who built dams, for example, always took calculated risks. Normally, a risk became known only when it was too late to take any effective action. That was not to reject the concept of risk entirely, however; it no doubt had a role to play in questions of prevention, and perhaps even of mitigation.

62. Lastly, he would suggest that draft articles 22 and 23 strike a balance between the two schools of thought. The concrete approach which had brought that about might also be transposed to other topics currently under consideration by the Commission. The Special Rapporteur had revealed that he was an eminent publicist in the field and one who was fully in touch with the subject; he had given the Commission very complete guidelines for the treatment of the topic.

The meeting rose at 1 p.m.

2125th MEETING

Tuesday, 27 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/412 and Add.1 and 2,[1] A/CN.4/421 and Add.1 and 2,[2] A/CN.4/L.431, sect. C, ILC(XLI)/Conf.Room Doc.4)

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART VI OF THE DRAFT ARTICLES:

ARTICLE 22 (Water-related hazards, harmful conditions and other adverse effects) *and*

ARTICLE 23 (Water-related dangers and emergency situations)[3] (*continued*)

1. Mr. BARBOZA congratulated the Special Rapporteur on the quality of his fifth report (A/CN.4/421 and Add.1

[9] J. Schneider, *World Public Order of the Environment: Towards an International Ecological Law and Organization* (University of Toronto Press, 1979).

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

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

[3] For the texts, see 2123rd meeting, para. 1.

and 2), which gave a lucid account of international practice. But did that practice reflect international custom? Personally, he believed that certain obligations such as notification, information and prevention were well established in international law as forms of co-operation. Whether those obligations were rules of customary international law or not might, moreover, not be of decisive importance. The Special Rapporteur had in fact proposed obligations which were reasonable, necessary for the functioning of the future convention and well anchored in the practice of States. Their legal force would depend not on customary law, but on the convention which would ultimately be adopted.

2. With regard to the question whether secondary rules should be included (*ibid.*, para. 5), he said that, since the draft did not deal with responsibility, it would be better to let the general rules operate, for they covered all possible cases, including the breach of the obligations provided for in the articles. It would also be preferable to avoid complicating the task of the Special Rapporteur entrusted with the topic of State responsibility by introducing special rules in the present draft.

3. Referring to the titles of part VI of the draft and of draft article 22, he pointed out that, in English, the term "hazard" had two meanings: it referred to the risk of an event and to the event itself, namely to the "harmful condition". A flood, for example, was a "hazard" connected with the existence of the watercourse, but it was also a "harmful condition" once it had occurred. Those titles and the text of article 22 thus repeated the same concept; perhaps the words "harmful conditions" could be deleted. Moreover, the meaning of the words "adverse effects" was too broad: the Commission's concern was not every imaginable effect of the uses of watercourse systems, but only the harm deriving from water-related hazards. In Spanish, the expression *condición dañina* did not have any particular meaning in the present context and would give rise to problems.

4. Article 22 was divided into two parts, the first relating to natural hazards and the second to hazards which either were man-made or to the occurrence of which human activities contributed. In the first part, it was clear that the Special Rapporteur had reverted to the "basin" concept, which highlighted the relationship not only between the waters of a watercourse, but also between those waters and various other factors. Who could then deny that the waters of a watercourse system were a shared natural resource? Was there anything more convincing than the wording of draft articles 22 and 23 to show that a watercourse system was a shared natural resource? If it were agreed that there was an interrelationship between the waters of a watercourse and the other factors in question, however, the square brackets around the word "system" in the earlier articles would have to be deleted.

5. Paragraph 3 of article 22, which dealt with man-made risks, did not appear to serve any useful purpose: article 8 as provisionally adopted at the previous session[4] already prohibited States from causing appreciable harm to other watercourse States and that prohibition must naturally include the obligation of due diligence, which would take account of prevention. In any case, the Special Rapporteur recognized in paragraph (6) of his comments on article 22 that "this obligation is nothing more than a concrete application of article 8". Furthermore, the provisions of part III of the draft (Planned measures) could also apply to a great extent to the activities referred to in article 22, paragraph 3. Article 11,[5] in particular, was very broad in scope, since it related not only to planned measures for a watercourse, but also to planned measures in general.

6. From another standpoint, however, article 22, paragraph 3, went much further than the prohibition not to cause appreciable harm and appeared to introduce a very general concept of environmental law into the draft. It would be noted that the text referred to activities under the "jurisdiction or control" of watercourse States, a formulation which had been used in other instruments, as was known, in order to refer to activities outside the territory of a State. But how could an aircraft or a ship on the high seas cause a flood? Watercourses were eminently territorial and any appreciable harm or disaster in a particular country was bound to produce sufficiently important effects in a more or less neighbouring territory. While he had no objection to the expression "jurisdiction or control", he believed that it might make article 22 too broad in scope.

7. In his comments (para. (6) *in fine*), the Special Rapporteur explained that paragraph 3 was "somewhat broader" than the provision he cited from article 1 of the articles on "The relationship between water, other natural resources and the environment" adopted by ILA in 1980, "since the harm against which it is intended to protect would not be confined to 'injury to . . . water resources'". Since the ILA text stated that the management of natural resources must not cause substantial injury to the "water resources of other States", it might be asked how far draft article 22 would lead the Commission. Did the Special Rapporteur have in mind activities conducted in the territory of a watercourse State or anywhere under its jurisdiction or control that might affect the waters of a system and thus cause a water-related hazard or other "adverse effects" which had no relation with the watercourse? That might lead the Commission too far away from the subject of watercourses. It was in fact difficult, if not impossible, to determine the contribution of human behaviour to the occurrence of certain disasters. In his report, the Special Rapporteur referred, for example, to the effects of the phenomenon of global warming on water-related dangers: how was it possible to determine the influence of each of such factors on a watercourse system or in the occurrence of a flood? In what cases would the future convention apply and when would other instruments dealing with the protection of the environment be applicable? It was also significant that the many examples of international practice included in the report did not refer to human activities: they related either to natural phenomena or to fields other than watercourse law. He therefore supported paragraphs 1 and 2 of article 22, but did not think that paragraph 3 had a valid legal basis or served any useful purpose.

8. The measures proposed in article 23, on water-related dangers and emergency situations, were sensible. In paragraph 2, the words "all practical measures" should be replaced by "the best practical available measures", in order

[4] *Yearbook . . . 1988*, vol. II (Part Two), p. 35.

[5] *Ibid.*, p. 45.

to take account of the situation of developing countries; moreover, the words "prevent" and "neutralize" meant the same thing.

9. Lastly, with regard to paragraph 3 and to paragraph (4) of the Special Rapporteur's comments on article 23, it could be asked how States in the affected area and international organizations which were not parties to the future convention could be required to co-operate in eliminating the causes and effects of the danger or emergency situation and in preventing or minimizing harm therefrom. The obligation was not one *erga omnes*, and the legal effect of the convention was the only relevant consideration.

10. Mr. CALERO RODRIGUES said that, although the Special Rapporteur's fifth report (A/CN.4/421 and Add.1 and 2) contained a wealth of information, it was somewhat unbalanced, in so far as there were only five pages on the texts of draft articles 22 and 23 and the comments on them, as against more than 80 pages on the sources. Was there really a connection between the topic and all that documentation? For example, it was not at all certain that principles applicable to the Amazon or the Mekong could be drawn from a convention on ice-conditions concluded by the countries of northern Europe. The Special Rapporteur had also dealt with world problems such as global warming, which might or might not be relevant to the present topic. In introducing his report, he had referred at length to the recent floods in Bangladesh: what could be learned from that example about the rights and obligations of States in the situations referred to in articles 22 and 23? All that documentation could really be useful only if it were analysed in depth—and that was something members of the Commission had been unable to do because of the lack of time. It would be better, in future, if the Special Rapporteur could distil the content of his information in the draft articles themselves.

11. Articles 22 and 23 involved difficult problems of terminology. He recalled in that connection that the Special Rapporteur had proposed a subtopic on water-related hazards and dangers in the outline submitted in his fourth report (A/CN.4/412 and Add.1 and 2, para. 7); that draft article 18[19] as submitted in 1988[6] dealt with emergency situations caused by pollution or other environmental emergencies, in other words with "any situation affecting an international watercourse which poses a serious and immediate threat to health, life, property or water resources" (para. 1); that paragraph 2 of article 18[19] related to conditions or incidents which created an emergency situation as a result of pollution or other environmental emergencies; and that it had been suggested at the previous session that a more general approach should be adopted to the question of emergency situations without necessarily linking them to pollution, since the scope of article 18[19] was relatively easy to understand, whereas it was not so easy to decide whether States were faced by a hazard or a danger.

12. The texts now proposed for articles 22 and 23 seemed to take a different line. The Special Rapporteur had explained that the former addressed chronic situations and the latter unforeseen situations, but the language used in the two articles did not bring out that distinction clearly. For instance, the expression "emergency situations" in article 23 was diluted by the words "water-related dangers", which came before it. In article 22, moreover, the concept of "water-related hazards" was rather vague and it seemed difficult to relate "harmful conditions" to "adverse effects": conditions lay at one end of the spectrum and effects at the other. The reference to harmful conditions and "other" adverse effects seemed to imply that a "harmful condition" was an adverse effect. Because of that uncertain terminology, there were problems with the scope of the two articles, although they could be solved by characterizing the situations which each article was intended to cover. Rather than entrusting the Drafting Committee with the task of finding suitable wording, the Commission might request the Special Rapporteur to propose a revision along those lines.

13. Draft articles 22 and 23 contemplated situations which, as a result of human activities or natural events, created serious danger for the watercourse or other interests. The main thing was, therefore, to define the obligations and rights of the States concerned. In both cases—impending danger and emergency situations—the general obligation to co-operate laid down in article 9 as provisionally adopted[7] found specific application. In that connection, he noted that article 22, paragraph 1, referred to co-operation "on an equitable basis", a qualification which had already given rise to criticism. Moreover, the Special Rapporteur did not explain its exact meaning and it did not appear in article 23, paragraph 3. Were the conditions of co-operation any different in the latter case? In any event, it would be better to rely on the concept of "mutual benefit", which was one of the bases of the general obligation to co-operate stated in article 9.

14. Furthermore, the purpose of co-operation was, under article 22, to prevent or mitigate situations of impending danger and, under article 23, to eliminate the causes and effects of emergency situations "to the extent practicable under the circumstances" (para. 3), a qualification which did not appear in article 22 since it was implicit in the words "on an equitable basis", as the Special Rapporteur explained in his comments on article 22 (para. (2)). Perhaps the Special Rapporteur had found it necessary to include that qualification in article 23 because the article went so far as to provide that one of the aims of co-operation was to eliminate the causes of an emergency situation. But how could the causes of an imminent flood, for instance, be eliminated? The purposes of co-operation in both articles should be set forth in more modest and general terms to preclude the need for any qualification.

15. He had no major difficulty in accepting that co-operation should be required from watercourse States (art. 22) and even from States in the area affected and from competent international organizations (art. 23), but he believed that article 23, paragraph 3, should be redrafted. It was for the parties to the future convention to seek the co-operation of such States and of international organizations and it would not be technically correct to impose an obligation to co-operate on States and international organizations that were not parties.

16. Article 22, paragraph 2, under which co-operation took the form of the exchange of data and information and the

[6] *Ibid.*, p. 32, footnote 94.

[7] *Ibid.*, p. 41.

planning and application of joint measures, was unnecessarily complicated. The consultations provided for in subparagraph (*b*) added a superfluous procedural element and the expression "structural and non-structural" had already attracted criticism. Similarly, subparagraph (*c*) should refer simply to the follow-up of the measures. In general, he wondered whether it was possible, or even necessary, in article 22 and also in article 23, under which co-operation took the form of development and implementation of contingency plans, to provide for the forms or modalities of co-operation other than on an indicative basis. Would it not be better to establish the obligation to co-operate and indicate its aims, leaving it to States to determine the forms and modalities of that co-operation?

17. With regard to the obligation of information set forth in article 10 as provisionally adopted[8] and referred to in article 22, paragraph 2 (*a*), and in article 23, paragraph 1, he considered that information played such a prominent role in cases of impending danger or emergency situations that a separate provision should be devoted to it to emphasize its importance and indicate the specific features it should have. Such a provision should be the first paragraph of each draft article, since information was the basis for all subsequent measures. To that end, the structure of article 22 should be brought into line with that of article 23.

18. On the question of structure, he noted that the obligation of States to take immediate "practical"—or, as he would prefer, "appropriate"—measures was clearly set forth in article 23, paragraph 2, whereas, in article 22, a similar obligation was referred to only in paragraph 3 and in terms that were not entirely satisfactory. That provision probably restated the terms of article 8,[9] whereby States were required to utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States. It went further, however, since it applied not only to activities related to the utilization of the watercourse, but to all activities under the jurisdiction or control of the State. That meant that States had a general obligation to prevent any human activities under their control, regardless of whether they were connected with the watercourse, from creating a situation of impending danger for other States. Although that was a considerable extension of a State's obligations, it might perhaps be acceptable if it were made clear that the situation must be one in which the impending danger was of considerable magnitude and was much more serious than the "appreciable harm" referred to in article 8. Such situations could, however, result from natural causes and the question then was whether States had an obligation to take individual measures in such cases. The answer could be given only after detailed consideration of all the elements involved and, in particular, of the scope of article 22.

19. In conclusion, he recommended that the scope of articles 22 and 23 be clearly defined, with a precise indication in each case of what was required of States in the fields of information, individual measures and co-operation.

20. Mr. AL-BAHARNA expressed appreciation for the Special Rapporteur's fifth report (A/CN.4/421 and Add.1 and 2), which was based on a wealth of material and contained highly instructive scientific and hydrological information.

21. Water-related hazards, whether due to man-made causes or to natural phenomena, entailed disastrous consequences and thus called for international control and regulation. From the standpoint of obligations, however, a distinction should probably be made between the various causative factors. As the Special Rapporteur stated, "the legal régimes of prevention, mitigation and reparation should . . . take into account not only the nature of the disaster . . . but also the degree to which human intervention contributes to harmful consequences"; consequently, "the obligations of watercourse States would increase with the degree of human involvement" (*ibid.*, para. 4). Those obligations had to be translated into practical action, however, and that was no easy task.

22. The Special Rapporteur raised the question (*ibid.*, para. 5) whether the draft articles on the subtopic should contain, in addition to the primary rules setting forth the obligations of watercourse States, secondary rules specifying the consequences of the breach of such obligations. His own view was that the Commission should, in so far as possible, restrict itself to the primary rules, as the secondary rules were being dealt with in the draft articles on State responsibility. In that way, the Commission would avoid duplication of effort while promoting uniformity of treatment in respect of the rules on State responsibility.

23. He was pleased to note that the Special Rapporteur referred in the report to the possible effects of climatic changes, and especially global warming, on fresh water—a matter which had figured prominently at ecological conferences in the past two years. Whether or not it was direct, the link between the "greenhouse effect" and floods should be contemplated in the draft articles, for to ignore such problems could have highly detrimental consequences in the long term.

24. The Special Rapporteur had rightly given a prominent place in the report to floods and their main causes, since floods were the most serious form of water-related hazards. For that reason, several agreements had been concluded between watercourse States to provide for consultation, exchange of data and information, the operation of warning systems, planning and execution of flood control measures and the operation and maintenance of works. Such agreements no doubt signified the existence of norms of international law on the subject. Care would, however, have to be taken in determining the precise nature of those rules, which seemed to derive their force from the "conventional rule" as such, rather than from custom. In that connection, he recalled that the judgment of the ICJ in the *North Sea Continental Shelf* cases had stated that not all conventional norms were accepted as customary norms by the *opinio juris*: the applicable test in such a case was that "the States concerned must . . . feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough."[10] He

[8] *Ibid.*, p. 43.

[9] See footnote 4 above.

[10] *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 3, at p. 44, para. 77.

therefore urged the Commission to proceed with caution in inferring customary norms from international treaties and agreements on watercourses. More particularly, since the draft articles were to take the form of a framework agreement, he invited the Commission to formulate the provisions on floods in more general terms, so that watercourse States might fill out the specifics according to the circumstances.

25. The need for caution in the case of floods also arose in the case of other factors causing water-related hazards or dangers, which included ice conditions, drainage problems, flow obstructions, siltation and erosion. The provisions on those factors should also be formulated in broad terms to enable States to adapt them to their specific requirements by means of more detailed and comprehensive regulations.

26. With regard to draft articles 22 and 23, he wished to make a few general comments on methodology. First, it would have been better if the articles had been presented first, followed by detailed comments and an analysis of the law and practice on the subject; that would have given a better indication of the direction in which the law was being developed. Secondly, the fact that the Special Rapporteur had tried to deduce the rules applicable to water-related hazards from general principles of international law, such as those laid down in the *Corfu Channel* case (*ibid.*, para. 90) and the *Trail Smelter* case (*ibid.*, para. 103), meant that, wittingly or unwittingly, the draft articles had acquired the character of general propositions. Thirdly, he would have preferred the Special Rapporteur to treat the obligations of watercourse States in the event of water-related emergency situations separately depending on whether those situations were caused by natural phenomena or by human activities. The degree of culpability was greater in the latter case and, consequently, the nature of the obligations had to be different.

27. His first comment on draft article 22 was that the formulation was too general. In paragraph 1, the words "on an equitable basis", which were used to qualify the obligation of watercourse States to co-operate in order to prevent or mitigate water-related hazards, made the principle of co-operation too elusive to serve as a guide. The beginning of the paragraph should read: "Watercourse States shall co-operate in accordance with the provisions of the present Convention". That change would, on the one hand, make it possible to avoid the use of the words "on an equitable basis" and, on the other, relate co-operation to all the relevant provisions of the future instrument.

28. Paragraph 2, which listed the steps to be taken by watercourse States pursuant to paragraph 1, was, on the other hand, too strict; the steps indicated in subparagraphs (*a*), (*b*) and (*c*) seemed to suggest that the obligations were cumulative and applied equally to all the situations referred to in paragraph 1, whereas, in fact, each type of situation might require a different kind of response. He therefore suggested that paragraph 2 be redrafted in such a way as to indicate the kind of action to be taken with regard to each particular danger under consideration. Furthermore, he preferred the word "measures" to "steps", had reservations concerning the use of the word "obligations" and was not sure that he understood the meaning of the words "structural and non-structural".

29. With regard to paragraph 3, he pointed out that the proposed text owed a great deal to the decision of the ICJ in the *Corfu Channel* case (*ibid.*, para. 90). He had no disagreement with the Court's dictum, but he doubted whether it could be used in the context of paragraph 3, which might well be unnecessary, since article 8 (Obligation not to cause appreciable harm) as provisionally adopted[11] would also apply to water-related hazards; the Special Rapporteur himself, in his comments on article 22, admitted that the obligation provided for in paragraph 3 was "nothing more than a concrete application of article 8" (para. (6)). The Commission therefore did not have to go beyond article 8, which was more generally applicable. For the reasons already given by other members, he would prefer paragraph 3 to refer to activities conducted "in the territory" of watercourse States, rather than to activities "under their jurisdiction or control", an expression which he found ambiguous. In short, the whole of article 22 needed to be reviewed.

30. Draft article 23 did not differ much from article 22 and also did not make a clear-cut distinction between situations caused by human activities and those arising from natural phenomena. Its provisions should be confined to emergency situations and should spell out separately the legal consequences flowing from the two different kinds of situations. Furthermore, the reference to "intergovernmental organizations" (para. 1) and to "international organizations" (para. 3) was inappropriate. There was no international organization vested with competence in matters relating to international watercourses, as there was, for example, in the case of the environment. True, certain watercourse States had set up various kinds of intergovernmental machinery that was entrusted with specific functions. If the reference in paragraphs 1 and 3 was to such machinery, the two expressions should be amended accordingly.

31. Commenting further on drafting points, he asked why the Special Rapporteur had used the words "all practical measures" in article 23, paragraph 2, rather than the words "all measures necessary", which were contained in article 22, paragraph 3, and would be more appropriate in the case of article 23, dealing as it did with emergency situations. He also asked why the verb "minimize" was used in article 23, paragraph 3, instead of the verb "mitigate", which was used in article 23, paragraph 2, as well as in article 22, paragraphs 1 and 2. Unless there was a special reason for using the verb "minimize", the verb "mitigate" should be employed in both articles. Article 23 as a whole needed to be further streamlined.

32. Finally, he had no objection to the principle of compensation referred to in paragraph (5) of the Special Rapporteur's comments on article 23. With regard to the question raised in paragraph (6) of the comments, he did not think that a provision requiring a State affected by a disaster to accept proffered assistance and not to regard offers thereof as interference in its internal affairs was desirable or necessary.

33. Mr. SHI congratulated the Special Rapporteur on his excellent fifth report (A/CN.4/421 and Add.1 and 2) and on draft articles 22 and 23, which had solid foundations in

[11] See footnote 4 above.

international practice, treaties, doctrine and court decisions. All those sources would be of great assistance in preparing the commentaries to the articles.

34. He agreed with the Special Rapporteur that all types of water-related hazards and dangers, whether natural, man-made or a combination of both, should be treated in a single article or set of articles. On the one hand, it was sometimes difficult to separate natural phenomena from the results of human activity and, on the other, the treaty practice of States showed that obligations were imposed with regard to water-related dangers caused both by natural forces and by human intervention. The form, content and scope of the legal consequences of a breach of such obligations could differ depending on whether the danger was caused by nature, human activity or a combination of the two. In that connection, he noted that the question whether the draft articles should include secondary rules was a complex one on which no quick decision could be taken. Moreover, now was not the time to raise that question, for the Commission aimed to complete the consideration of the draft articles on first reading by the end of its current term of office, in 1991. He was therefore in favour of leaving the question aside, at least for the time being.

35. Draft articles 22 and 23 were acceptable on the whole. He agreed with other members of the Commission that parts of the wording of article 22, for example the expression "structural and non-structural" in paragraph 2 (*b*), should be further clarified. He also wondered whether there was much difference between "hazards", "harmful conditions" and "other adverse effects". He was still unconvinced by the argument the Special Rapporteur had put forward in paragraph (6) of his comments on article 22 to justify the use of the expression "jurisdiction or control", rather than "territory", in paragraph 3.

36. Replying to the questions raised by the Special Rapporteur in his comments on article 23, he said that he was in favour of the inclusion of a definition of "water-related dangers or emergency situations" in article 1, on the use of terms.

37. With regard to the question whether States benefiting from protective or other measures should be required to compensate third States for the measures taken, he thought that no general rule should be laid down, since everything depended on the circumstances. If, for instance, the protective measures were taken specifically or mainly for the benefit of another State, the requirement of compensation was justified; however, if a protective measure was taken by a riparian State mainly to meet its own needs and the downstream State could objectively or indirectly benefit from the measure, it should not be required to pay compensation.

38. The question whether a State affected by a disaster should be required to accept proffered assistance was, in his opinion, a theoretical one. One State could not, as a matter of law, compel another State to accept assistance; acceptance of assistance was a matter of the State's own volition and could not be made a legal obligation. On the other hand, a State affected by a disaster would normally know whether it could cope with the disaster by its own efforts and would request assistance from other States if there were an urgent need and if it did not have the technical, material or financial means to meet that need. He agreed that offers of assistance should not be regarded by the affected State as interference in its internal affairs, provided that such offers were not politically or otherwise conditioned.

39. Mr. BARSEGOV thanked the Special Rapporteur for his extremely interesting fifth report (A/CN.4/421 and Add.1 and 2), which contained much useful information on the relevant practice of States, including the Eastern European countries and particularly the Soviet Union.

40. Draft articles 22 and 23 dealt with an extremely important aspect of international watercourse law, namely hazards connected with phenomena such as floods, drainage problems, flow obstructions, siltation, erosion, salt-water intrusion, drought and desertification, which were capable of causing large-scale damage. Some of those phenomena occurred gradually, while others happened suddenly and required emergency measures. In some cases, it was natural phenomena that were involved; in other cases, it was human activity, which could aggravate natural phenomena, but could also mitigate them. The prevention of such hazards and dangers required intensive international co-operation whose form would vary according to the situation. It therefore seemed appropriate to draw a distinction between projected and planned day-to-day co-operation, and co-operation in emergency situations, in other words the adoption of extraordinary measures to handle extraordinary situations.

41. In dealing with co-operation in connection with international watercourses, it was also important to take account of the features that were common to all watercourses and those which were specific to individual ones. It was unfortunate that, in article 22, paragraph 1, the Special Rapporteur had omitted the phrase "as the circumstances of the particular international watercourse system warrant", or its equivalent, which, as the Special Rapporteur pointed out in paragraph (2) of his comments on the article, had been included in the corresponding texts proposed by the previous Special Rapporteurs, Mr. Evensen and Mr. Schwebel. He was not entirely convinced by the Special Rapporteur's argument that that phrase was implicit in the expression "on an equitable basis", for the concept of an equitable basis, which was absolutely essential as the foundation for co-operation, was not relevant in that context. It was hard to see why, in explaining his use of the "equitable basis" concept, the Special Rapporteur adduced his concern to limit the number of possible exceptions, since international co-operation must come into play wherever necessary, although with due regard for the features of each individual watercourse.

42. As to the content of the "equitable basis" concept, he was prepared to accept the elements referred to in paragraph (3) of the comments on article 22, which indicated that co-operation "on an equitable basis" encompassed the duty of an actually or potentially injured watercourse State to contribute to or provide appropriate compensation for protective measures taken, at least in part, for its benefit by another watercourse State. He believed that those were valid principles and that they should be incorporated in the text of the article, after being suitably expanded and elaborated on in greater detail. The texts cited by the Special Rapporteur, particularly article 6 of the set of articles on flood control adopted by ILA in 1972 (*ibid.*, para. 77), also seemed to point to the existence of such principles. What was even more important, however, was the practice

of States, which took account in a reciprocal manner of their duties and obligations on an equitable basis.

43. He agreed with other members that the expression "both structural and non-structural", in paragraph 2 (*b*) of article 22, was not very clear and should be explained. Paragraph 3 was also not clear enough and should be reworked; it should be explicitly stated that the measures in question were those taken by States "individually or jointly". He would also prefer to refer to activities "carried on in the territory" of the States concerned, rather than to activities "under their jurisdiction or control". Unlike the Special Rapporteur, he believed that clarity should be the predominant concern and that, in that particular case, using the 1982 United Nations Convention on the Law of the Sea as a model was not justified.

44. In short, therefore, the entire structure of articles 22 and 23 should be revised in order to make their presentation more logical. In addition, the articles should be brought into line not only with one another, but also with all the other articles, while keeping the draft as a whole as coherent as possible.

45. He had no objection to the substance of article 23, but found that it was somewhat lacking in legal precision. For example, it would be better to spell out what was meant by "water-related dangers and emergency situations". He failed to understand the meaning of the word "primarily" in the second sentence of paragraph 1. The intention behind the second sentence had to be clear from the article, but the wording should be improved. Paragraph 2 was similarly imprecise. The greatest possible clarity was necessary in drafting such provisions.

46. With regard to the question raised by the Special Rapporteur as to whether the draft articles should establish a legal obligation to assist a State affected by a disaster and require such a State to accept offers of assistance—issues referred to in the report (*ibid.*, para. 81 *in fine*)—he pointed out that, in the absence of agreement, the problem of assistance had so far been solved on the basis of political and moral considerations and that various types of political restrictions had hampered the development of broader co-operation. The provision of assistance was decided on the basis of political considerations or at least had a political element in most cases. Acceptance of assistance might also be restricted by fears of political consequences of one kind or another. That was changing nowadays, thanks to new thinking on the question and owing to the proliferation of hazards to which States were subjected by the use of new technologies and by the growth of interdependence. Fate had had it that that new attitude should become apparent in the Soviet Union, first during the Chernobyl disaster and, even more so, after the earthquake in Soviet Armenia. While generosity during the first disaster had not always been free from political motivation, the international reaction to the tragedy in Armenia had been an important turning-point in the expression of human solidarity, which had been made possible by *perestroika* in the Soviet Union and by the general change in the international community's attitude to such disasters. In that connection, he expressed his gratitude for the disinterested assistance provided to the people of Soviet Armenia and thanked all those peoples which had reacted in the right way to the tragedy.

47. If that solidarity was to be expanded and strengthened, however, it now had to be shored up by means of a legal framework. In connection with liability for transboundary harm arising out of lawful activities, he had stressed the need for mutual assistance between the State of origin and the affected State and had explained during the Commission's consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law that he disagreed with the decision by the Special Rapporteur for that topic to delete the provision on mutual assistance in article 7 as already referred to the Drafting Committee.[12] That unacceptable approach was related to the change in the concept of liability reflected in Mr. Barboza's fifth report on that topic (A/CN.4/423).

48. He therefore believed that it was necessary to stipulate in draft article 23 under consideration that the provision and acceptance of assistance must be entirely free from all political considerations and in line with the common interests of the watercourse States and, ultimately, those of the international community as a whole. That would pave the way for close co-operation among States in conserving an extremely precious resource, namely water, which was essential to life.

49. In order for provisions on responsibility in connection with the use of international watercourses to be elaborated, the primary rules governing the use of international watercourses must already have been formulated, for it was clear that secondary rules could be devised only after primary rules had been established. Only after obligations of conduct relating to the use of watercourses had been defined would it be possible to determine the scope of those two types of international responsibility and the legal foundation on which they were based. For many years, the Commission had been studying the question of responsibility in connection with two other topics and care must be taken in saying that rules already applied to watercourses, whereas, in fact, they were still being worked out in more general fields. Once they had come into being, they would have to be adapted to the specific topic of international watercourses. Attempting to define responsibility only in terms of the use of international watercourses would jeopardize the rest of the Commission's work. Although he did not think that the Commission should give up the idea of considering the problem of responsibility in due course, he agreed with Mr. Barboza that it was not helpful to study the question in the context of international watercourse law.

50. With regard to the sources of law cited by the Special Rapporteur, he agreed with Mr. Reuter (2123rd meeting) and other members that what was perhaps too daring an interpretation of existing agreements might create an artificial legal foundation for the formulation of rules governing the use of watercourses. Legal precedents could properly be invoked to confirm the existence of a rule of international law, but they must relate to a legal situation that was exactly like the one to be covered in the topic under consideration. In the *Corfu Channel* case,[13] the rights and obligations of riparian or user States had been determined within the

[12] See 2113th meeting, para. 22.

[13] Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.

framework of the legal régime governing territorial waters, but the situation was entirely different in the case of watercourses.

51. In his fifth report, the Special Rapporteur had called on the authority of the great seventeenth and eighteenth-century jurists who had set forth their sometimes naive or mystical conceptions of international law. While he had nothing but respect for the classics, he thought that, in all fairness, the position of the positivist school should also be brought out. However, the main authorities were to be found in bilateral and multilateral agreements and conventions, for the Commission had to focus its work on the study and generalization of the experience gained and the practice developed by States in solving problems that might arise during the use of international watercourses.

52. In conclusion, he said that he had referred only *in fine* to the subject of the sources of law on the uses of international watercourses in order not to give the wrong impression about his generally positive reaction to the ideas expressed in the draft articles. He did believe, however, that the articles should be revised, taking into account the comments made and the sometimes serious reservations expressed during the Commission's discussion.

The meeting rose at 11.45 a.m.

2126th MEETING

Wednesday, 28 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

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

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/412 and Add.1 and 2,[1] A/CN.4/421 and Add.1 and 2,[2] A/CN.4/L.431, sect. C, ILC(XLI)/Conf.Room Doc.4)

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART VI OF THE DRAFT ARTICLES:

ARTICLE 22 (Water-related hazards, harmful conditions and other adverse effects) *and*

ARTICLE 23 (Water-related dangers and emergency situations)[3] (*concluded*)

1. Mr. OGISO said that the wealth of detailed material the Special Rapporteur had provided in his excellent fifth report (A/CN.4/421 and Add.1 and 2) and brilliant oral introduction (2123rd meeting) would be of great assistance to the Commission in its task of codifying the law of the non-navigational uses of international watercourses.

2. Referring to draft article 22, paragraph 1, he said that he had doubts about the use of the words "on an equitable basis" to describe the way in which watercourse States were required to co-operate. The wording used in article 6, paragraph 2, and article 7, paragraph 1, was "in an equitable and reasonable manner", and he drew attention in that regard to paragraph (5) of the commentary to article 6.[4] Although the area of co-operation covered by articles 6 and 7 differed from that covered by draft article 22, the conceptual basis for co-operation should, in his view, be the same. Readers would find the articles easier to understand if the same terminology were used throughout. However, if the Special Rapporteur had meant to emphasize the difference between the areas of co-operation covered, an appropriate explanation should be included in the commentary.

3. With regard to article 22, paragraph 2 (*a*), which referred to the "regular and timely exchange" of data and information, he recalled that paragraph 1 of article 10 as provisionally adopted[5] comprehensively covered the issue of data and information exchange. It might be enough to refer to that provision in article 22, adding that, in the case of water-related hazards, the exchange should be conducted with greater frequency, in the light of developments in the situation.

4. Draft article 23, paragraph 3, referred to co-operation between "States in the area affected by a water-related danger or emergency situation, and the competent international organizations" and, in that connection, the Special Rapporteur had mentioned the example of the recent floods in Bangladesh. He joined the Special Rapporteur and other members of the Commission in expressing his sympathy for the suffering of the people of Bangladesh. That country's experience showed that there were two types of emergency assistance, namely assistance to stop the flood damage itself and assistance to mitigate the suffering of the victims through supplies of food and medical care. In the case of the Bangladesh floods, immediate assistance had been offered by many members of the international community, including countries not directly affected by the disaster, both through international organizations and on a

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

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

[3] For the texts, see 2123rd meeting, para. 1.

[4] For the texts of articles 6 and 7 and the commentaries thereto, provisionally adopted by the Commission at its thirty-ninth session, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 31 *et seq.*

[5] *Yearbook . . . 1988*, vol. II (Part Two), p. 43.

bilateral basis. As far as he knew, the assistance offered by non-watercourse States had been used for the purpose of mitigating the flood victims' suffering and, in the words of article 23, paragraph 3, for co-operation in "preventing or minimizing harm" resulting from the emergency situation. That paragraph seemed to be intended to cover the two types of assistance he had mentioned, but it was too limitative, since it referred only to affected States and international organizations. Its wording should be made more flexible so as to include voluntary emergency assistance by non-watercourse States.

5. Two drafting points on which he wished to seek clarification from the Special Rapporteur related to the use of the words "relevant intergovernmental organizations" in paragraph 1 of article 23 and the words "competent international organizations" in paragraph 3, and to the difference between the word "neutralize" in paragraph 2 and the word "minimizing" in paragraph 3. Unless a distinction was deliberately being made, standard terms should be used in the interests of greater simplicity.

6. In reply to the question raised by the Special Rapporteur in paragraph (6) of his comments on article 23, namely whether the article should include a provision requiring a State affected by a disaster to accept proffered assistance and not to regard offers thereof as interference in its internal affairs, he shared the view of some other members that the decision should be taken by the State concerned in the light of a variety of factors. It could be presumed, for example, that if the damage was very great the affected State would welcome any assistance offered, whereas, if the damage was relatively limited, it might prefer to accept assistance only from other States in the region or States with which it maintained traditional relations.

7. Mr. ILLUECA said that the Special Rapporteur's fifth report (A/CN.4/421 and Add.1 and 2), which was of the same high standard as the four previous ones, would be of great assistance to the Commission in its efforts to achieve the goal of completing the first reading of the draft articles by 1991.

8. The importance and urgency of the present topic had been stressed during the debates in the Sixth Committee at the forty-third session of the General Assembly, as well as in the 1987 report of the World Commission on Environment and Development, entitled "Our common future".[6] That report indicated that global water use had doubled between 1940 and 1980 and was expected to double again by the year 2000. No fewer than 80 countries, with 40 per cent of the world's population, already suffered serious water shortages. River-water disputes had occurred in all continents. Global warming caused by the atmospheric buildup of carbon dioxide and other gases would lead to disruptive climatic changes, and the rise in sea-levels during the first half of the next century would have disastrous consequences for coastal States and change the shapes and strategic importance of international watercourses.

9. One international watercourse was the Panama Canal, a freshwater canal which linked the Atlantic and Pacific Oceans and was governed by an international treaty with the United States of America that was due to terminate on 31 December 1999. Every time a ship went through the locks of the Panama Canal, 55 million gallons of fresh water flowed into the sea totally unused. In the financial year ended September 1988, 13,440 ships had gone through the Canal and 739,200 million gallons of fresh water had flowed into the ocean. That situation was a very special one and it involved a great many unknown factors.

10. In draft article 22, paragraph 1, the Special Rapporteur had omitted the phrase "as the circumstances of the particular international watercourse system warrant", or its equivalent—which, as the Special Rapporteur pointed out in paragraph (2) of his comments on the article, had been used in the corresponding texts proposed by his predecessors, Mr. Evensen and Mr. Schwebel—and had used instead the words "on an equitable basis", thereby introducing *jus aequum*, as opposed to *jus strictum*. Historically, the Roman-law concept of *aequitas* and the English-law concept of equity had been designed to remedy the gaps and rigidities in the civil-law and common-law systems. In view of the marked differences between those two major legal systems and the many different ways in which the concept of equity could be used, the Commission had to pay close attention to the scope that concept was to have in articles 6 and 7[7] and in articles 22 and 23, as well as to the principle of sovereign equality embodied in article 9.[8]

11. The articles he had mentioned clearly stated the general principles of equitable and reasonable utilization and participation (art. 6); factors relevant to equitable and reasonable utilization (art. 7); and the general obligation to co-operate (art. 9). Those general principles related to the water-related hazards, dangers and emergency situations which were dealt with in draft articles 22 and 23 and which required watercourse States to co-operate in an equitable manner. The purpose of those articles was to ensure that any conflict or controversy which might arise with regard to water uses was settled on the basis of equity. That was the conclusion reached by the Commission in the commentary to article 6, in which it had also stated that the practice of States revealed that there was overwhelming support for the doctrine of equitable utilization.[9]

12. The rule of equitable utilization had as its corollary the concept of equitable participation, which was governed by the principle of sovereign equality embodied in article 9 as a basic element of the general obligation to co-operate in order to attain optimum utilization and adequate protection of an international watercourse. It was significant in that regard that a number of modern agreements provided for integrated river-basin management and not simply for the application of the principle of equitable utilization. They thus reflected a determination to achieve optimum utilization, protection and benefits through organizations competent to deal with an entire international watercourse. For all those reasons, he was of the opinion that the expression "international watercourse system" should be used in the final text of the draft articles.

[6] A/42/427, annex.

[7] See footnote 4 above.

[8] For the text of article 9 and the commentary thereto, provisionally adopted by the Commission at its fortieth session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 41-43.

[9] *Yearbook . . . 1987*, vol. II (Part Two), pp. 32-33, paras. (9)-(10) of the commentary.

13. There appeared to be a consensus in the Commission that the principle of sovereign equality resulted in every watercourse State having rights to the use of the watercourse that were qualitatively equal to, and correlative with, those of other watercourse States. With regard to conflicts of uses, the Special Rapporteur and the Commission had therefore been right to try to provide in the draft for procedures relating to the adjustments or accommodations required in order to preserve each watercourse State's equality of right. The discussions in the Commission during the past three years had shown that the settlement of conflicts of uses could best be achieved on the basis of specific watercourse agreements. In any event, and in the absence of such agreements, such adjustments or accommodations were to be arrived at "on the basis of equity", as stressed by the Commission in paragraph (9) of the commentary to article 6.

14. The application of the principle of equity was particularly complex owing to the different ways in which it was used by Governments and courts. It was clear that much remained to be done to formulate and define what constituted equitable and reasonable conduct with regard to the non-navigational uses of international watercourses. Although the Commission's task was to produce a framework agreement, it must make every effort to formulate by 1991 the main rules and guiding principles deriving from the development of contemporary international law.

15. In paragraph (5) of his comments on article 22, the Special Rapporteur explained that he had used the word "include" in paragraph 2 in order to indicate that the list of steps to be taken was not exhaustive. It must, however, be clearly shown that, in some cases, it was expected that additional types or forms of co-operation might be necessary. He therefore suggested that the words "Without prejudice to other forms of co-operation" be added at the beginning of paragraph 2.

16. Paragraph 3, and article 22 as a whole, dealt with the principle of prevention, which was rightly regarded as the basis for action to protect the environment. In paragraph 3, the Special Rapporteur's preference for the expression "jurisdiction or control" rather than the term "territory" would give rise to problems in cases where part of a river basin in a territory under the jurisdiction of a sovereign State was, by virtue of an international treaty, subject to the control of another State which exercised administrative functions. Those problems could be avoided by referring both to the concept of "territory" and to that of "jurisdiction or control". Paragraph 3 might then begin: "Watercourse States shall take all measures necessary to ensure that activities within their territory or under their jurisdiction or control . . .".

17. In the light of the explanation provided by the Special Rapporteur in paragraph (4) of his comments on article 23, he would suggest that, in paragraph 3 of article 22, the words "appreciable harm to other watercourse States" should be amended to read: "appreciable harm to other States".

18. The Special Rapporteur had been right to specify in article 23, paragraph 1, that notification of water-related dangers and emergency situations should be made not only to watercourse States, but also to all "potentially affected States". The fact that they were not watercourse States was not a valid objection, since the future convention or framework agreement would be open for signature and ratification by all interested States.

19. In his third report on the topic,[10] Mr. Schwebel had submitted draft articles on equitable participation and use and on the general principle of responsibility. It was worth noting that, in environmental law, developments had been taking place with regard to the scope of liability and it was now being recognized that, in addition to States, individuals who had been innocent victims of harm were entitled to claim compensation, as in the *Trail Smelter* case.[11] Moreover, the Experts Group on Environmental Law of the World Commission on Environment and Development had, in its proposed legal principles for environmental protection and sustainable development,[12] endorsed the principle of strict liability, as opposed to the criterion of due diligence favoured by the Special Rapporteur.

20. Although that was a matter that came under the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law, he considered that, at a later stage, the Commission would have to consider the question of liability arising out of the particular circumstances of the non-navigational uses of international watercourses.

21. Mr. PAWLAK congratulated the Special Rapporteur on his clear and well-organized fifth report (A/CN.4/421 and Add.1 and 2), which contained a great deal of valuable material, including information relating to Eastern European countries.

22. He noted that the Special Rapporteur left open the question whether the draft articles on the subtopic of water-related hazards and dangers should include secondary rules specifying the consequences of the breach of primary rules setting forth the obligations of watercourse States (*ibid.*, para. 5). Draft article 22, paragraph 3, which was a combination of the wording of article 194, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea and of article 8 of the present draft as provisionally adopted[13] and was based on the approach adopted in paragraph 2 of draft article 16 [17],[14] set forth the basic obligation of watercourse States not to cause water-related hazards, harmful conditions and other adverse effects that resulted in appreciable harm to other watercourse States. As the Special Rapporteur himself admitted in paragraph (6) of his comments on article 22, that obligation was nothing more than a concrete application of article 8. There could be no objection to the application of article 8 in the case of water-related hazards and dangers; it was a useful provision that covered a great many natural and man-made water-related phenomena.

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[10] *Yearbook . . . 1982*, vol. II (Part One) (and corrigendum), p. 65, document A/CN.4/348.

[11] Arbitral awards of 16 April 1938 and 11 March 1941 (United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*).

[12] Summarized in the report of the World Commission on Environment and Development (see footnote 6 above), annex 1.

[13] *Yearbook . . . 1988*, vol. II (Part Two), p. 35.

[14] Submitted by the Special Rapporteur at the fortieth session (*ibid.*, p. 26, footnote 73).

23. The question was, however, whether the Commission should confine itself to the primary rules as set out in article 8, or whether it should also try to formulate secondary rules which would follow from a breach of those primary rules. After all, other States affected by such a breach would not only expect the occurrence of the breach to be acknowledged, but also want to know who was going to make reparation for damage and provide compensation for losses. The problem related both to draft article 22 and to draft article 16 [17] concerning pollution. Most members of the Commission seemed to want to postpone a decision on the issue, some arguing that it was too late to think of introducing secondary rules, and others that the primary rules had to be considered first. Although he agreed with Mr. Shi and Mr. Barsegov (2125th meeting) that it would not be appropriate to deal with the problem now, he was inclined to recommend that secondary rules should eventually be included in the draft. Efforts in that regard should, of course, be harmonized with similar endeavours in connection with the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law.

24. In general, it could be said that draft articles 22 and 23, together with draft article 16 [17] and draft article 17 [18],[15] created some well-defined obligations of watercourse States with regard to the uses of international watercourses. While articles 16 [17] and 17 [18] related to environmental protection and pollution, articles 22 and 23 dealt with water-related hazards, both natural and man-made. The division was somewhat artificial, but he did not object to it at the present stage. However, emergencies and hazardous situations could also occur as a result of polluting activities, as the Special Rapporteur acknowledged by including a reference to such activities in article 23, paragraph 1. That type of obligation of a watercourse State was also addressed in article 16 [17], paragraph 2. It would therefore be desirable if all provisions relating to the pollution of watercourses could be included in one sub-chapter of the draft. The danger of pollution was one of the most common man-made dangers for the environment as a whole, including watercourses. It would also be desirable if the issue of co-operation in the field of prevention and control of watercourse pollution could be dealt with in the same sub-chapter.

25. He suggested that the words "under their jurisdiction or control" in article 22, paragraph 3, be replaced by "in their territory". At the end of the paragraph, the word "may" should be inserted between the words "that" and "result", since it was very difficult for a State to know that activities would result in appreciable harm to other watercourse States.

26. With regard to the second sentence of paragraph 1 of article 23, which defined the scope of the expression "water-related danger or emergency situation", he suggested that the text as a whole might be improved if all definitions were concentrated in a single article at the beginning of the draft. Paragraph 2 was too restrictive: although watercourse States were undoubtedly the first to be affected by the consequences of water-related dangers and emergencies, other States, particularly coastal States, as well as the marine environment, could also be endangered. He therefore proposed that the words "other watercourse States" in that paragraph be replaced by "other potentially affected States"; alternatively, the words "and other potentially affected States" could be added after "other watercourse States".

27. He did not basically disagree with the view expressed by the Special Rapporteur in paragraph (5) of his comments on article 23, although, in a normal situation, States benefiting from protective or other measures should not only be required to compensate third States for the measures taken, but also be consulted before such measures were implemented. That was how the problem was regulated in some bilateral agreements. As to the point raised in paragraph (6) of the comments, he agreed that, while the problem of non-interference in a country's internal affairs might theoretically arise in connection with assistance, the need to include a provision on mutual assistance among watercourse States was a more important issue. Such a provision would, in his view, solve the problem referred to in paragraph (6).

28. Mr. DÍAZ GONZÁLEZ said that, in his study of developments in what was a comparatively new topic, the Special Rapporteur had followed in the footsteps of his predecessor, Mr. Schwebel, whose third and last report[16] was an inexhaustible source of data and information which members of the Commission would be well advised always to bear in mind.

29. With regard to the Special Rapporteur's proposals, he stressed that more time and reflection were needed in order to arrive at any conclusions on the basis of the wealth of material provided by the Special Rapporteur. It was clear, however, that everything that had been done on the topic until now had been purely exploratory and that the subject exclusively involved progressive development of the law. He was therefore surprised that the Special Rapporteur should have formulated the rules contained in draft articles 22 and 23. It was doubtful whether those rules could be regarded as embodying firm obligations for States.

30. As Mr. Reuter (2123rd meeting) had pointed out, the existence of a number of bilateral treaties setting forth parallel provisions on certain points did not warrant the assumption that there were rules of general international law in the matter. Those instruments regulated specific aspects of the uses of watercourses in particular regions. The problems involved varied from one region to another and so did the solutions. Those instruments could be said to establish only the obligation of vigilance, not the obligations of conduct which the Special Rapporteur proposed in the draft articles.

31. There was clearly a trend in the treatment of the topic under consideration, as well as of those of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law, to go beyond the subject-matter proper and deal with the general theme of the environment. For example, the question of transboundary harm, which included harm caused by water uses, had been raised in connection with the topic of international liability. In the present topic, liability had been

[15] *Ibid.*, p. 31, footnote 91.

[16] See footnote 10 above.

referred to in connection with the problem of natural disasters such as floods. A flood, however, could not be said to have been caused by a State.

32. One of the precedents cited in support of the thesis of the responsibility of States in such cases was the *Corfu Channel* case,[17] in which Albania had been held responsible because it had not informed the United Kingdom that there were minefields in the Corfu Channel. That situation was completely different from the ones being dealt with under the present topic. The same argument applied to arbitral awards, which could not serve as a source of general international law.

33. In that connection, he drew attention to article 31 of part 1 of the draft articles on State responsibility,[18] which clearly indicated that a State could not be held responsible for cases of *force majeure* and fortuitous event. If a State built a dam without taking the proper precautions and brought about a flood that caused harm to other States, it would be held responsible. If the dam had been built properly, however, but was destroyed by a natural disaster, no fault could be attributed to the State, which therefore incurred no responsibility.

34. The draft articles under consideration raised problems of terminology and of co-ordination with the terminology of related topics, particularly that of State responsibility. A quite separate problem was the inadequacy of the Spanish texts, a matter to which he had often had occasion to refer. New terms had to be invented when new law was being developed and also when new technologies were developed. It was essential, however, that the new terms should be carefully defined and their scope strictly delimited in order to avoid divergent interpretations.

35. The Special Rapporteur had asked members to consider whether the draft articles should contain only primary rules or both primary and secondary rules. In his own view, there was no room in the draft for rules on responsibility, in other words secondary rules. The draft articles were intended as a general framework for the conclusion of bilateral agreements to regulate the uses of international watercourses. Rules on liability had no bearing on that framework.

36. Draft articles 22 and 23 dealt with the duties of States in the event of natural disasters. Some of those disasters were predictable, provided that the State concerned had the necessary technical equipment and know-how. Most States—and especially third-world countries—had no such facilities, however, and it would be wrong to assume that they were in a position to foresee certain disasters.

37. He found the wording of articles 22 and 23 much too vague. Terms such as "hazards", "harmful conditions" and "other adverse effects" could not be used in stating legal obligations.

38. He agreed with Mr. Bennouna (2124th meeting) that article 22 was unnecessary. The meaning of "co-operation on an equitable basis" was by no means as clear as the idea of "co-operation in good faith". The article seemed to be based on the principle of co-operation among States that served as the foundation for the new environmental law.

39. The references in the Special Rapporteur's report (A/CN.4/421 and Add.1 and 2) to matters such as deforestation and its effects on watercourses indicated that the scope of the topic was being broadened and militated in favour of the "watercourse system" approach, which he himself had advocated from the start.

40. With regard to the question of prevention, he stressed that an emergency situation could not be foreseen. The situation would be known only after the event had occurred. As to the preventive measures to be taken, he was at a loss to understand the meaning of the reference to "structural and non-structural" measures in paragraph 2 (*b*) of article 22.

41. In paragraph 3, the expression "appreciable harm" was unsatisfactory. Any harm, however unimportant, would be "appreciable", even if it did not result in injury. The words "substantial harm", as suggested by Mr. Tomuschat (2124th meeting), were preferable, for their meaning was clear.

42. Article 23 was a good basis for the formulation of the obligation of co-operation, but its wording would have to be looked at with great care. In particular, the words "potentially affected" should be used instead of the word "affected". More precise terms than "dangers" and "emergency situations" would have to be found. For the time being, there was no basis in State practice for the establishment of a binding rule of international law on the subject-matter of article 23.

43. In conclusion, he said that more time would be needed for the consideration of article 23 and the other articles the Special Rapporteur was to propose. On no account should the Commission rush through its work simply because it thought that it had to meet the 1991 deadline. It should bear in mind the possible consequences of such haste, as well as the need to maintain its usual high standard of work.

44. Mr. McCAFFREY (Special Rapporteur), summing up the discussion on chapter I of his fifth report (A/CN.4/421 and Add.1 and 2), said that he was grateful for the opportunity to reflect on a rich debate in which most members of the Commission had participated. He thanked those who had spoken for their valuable contributions, which would help to advance the work on the topic with a view to completing the consideration of the draft articles on first reading by the end of the current quinquennium in 1991.

45. In his report (*ibid.*, para. 18), he had raised the question whether the presence in a wide range of international agreements of provisions that greatly resembled one another could be taken as evidence of a rule of customary international law. There was broad support for that proposition among scholars and jurists, as could be seen from the report (*ibid.*, footnote 39). All the members of the Commission who had addressed the question, however, had disagreed with or expressed doubts about that proposition. Most of them had stated that it was immaterial, since the Commission's task was to generalize the experience of States in their relations involving international watercourses and as reflected in international agreements. Other speakers had noted that the Commission could ignore neither trends in practice nor contemporary problems and that the legal force of the articles would depend on their reasonableness. It had also been stated that the articles were supported by abstract logic and common sense. No speaker had denied

[17] See 2125th meeting, footnote 13.

[18] *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

that the field was susceptible of regulation by international law or challenged the need for rules in that area.

46. Mr. Mahiou (2123rd meeting) had suggested that, since all the agreements cited in the section of the report on floods were bilateral ones, they might be of limited value as a precedent for the Commission's framework agreement, which was intended as a multilateral instrument. As Mr. Beesley (2124th meeting) and others had pointed out, however, the problems involved were chiefly of a bilateral nature; hence the provisions of bilateral agreements were relevant and instructive. That was not to say that the problems were not regulated in multilateral agreements: one example was the 1980 Convention creating the Niger Basin Authority, to which nine countries were parties.

47. No member of the Commission had been particularly enthusiastic about the idea of formulating secondary rules. Several speakers had pointed out that, if water-related hazards and dangers were handled in that manner, all the other areas covered in the draft would have to receive the same treatment and it was too late in the day to embark on such an undertaking. Many speakers thought that entering into the kind of detail required for the formulation of secondary rules would complicate the draft unduly and be contrary to the framework-agreement approach. Most speakers had pointed out that the problem would best be treated in connection with the Commission's work on the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law and that duplication of efforts should be avoided. He agreed and did not plan to pursue the matter further.

48. Most speakers had supported the general thrust of draft articles 22 and 23 and the approach to the subtopic of water-related hazards and dangers. The vast majority of comments had been on matters of detail rather than on major questions of substance.

49. Mr. Njenga (*ibid.*) had referred to the vital and imperative need for co-operation in respect of shared natural resources and the "global commons". Mr. Shi (2125th meeting) had supported the approach of dealing with all types of water-related hazards and dangers in a single set of articles, since it was difficult to separate purely natural consequences from those resulting from human activity. The view expressed by Mr. Barboza (*ibid.*), namely that the draft articles demonstrated the interrelationship between the uses of land and water and that the word "system" should be removed from square brackets in the draft, had been supported by a number of other members. While expressing agreement with the approach adopted in the draft articles, Mr. Sreenivasa Rao (2124th meeting) had indicated that their main emphasis should be on prevention through, *inter alia*, institutional co-operation. Mr. Díaz González had been the only member to interpret article 22 as creating a responsibility on the part of watercourse States for damage arising from *force majeure*. Such responsibility was not supported by State practice, would certainly be unacceptable to States and went far beyond what he himself had envisaged in drafting the article.

50. Many of the terminology problems brought up during the discussion could be attributed to the fact that all the issues dealt with in articles 22 and 23 were physically interrelated. Human activity interacted with natural causes to produce harmful water-related consequences and it was extremely difficult to find general terms to cover all such phenomena. The "harmful effects of water" was the expression most often used by specialists, but he had avoided it because it seemed imprecise: it could cover almost any harmful effects, from pollution to floods. The expression might also be misleading because it was not only water that produced harmful effects: water might simply be a vehicle for transmitting harmful substances from one State to another, as in the case of pollution. Yet the term "hazards" was problematic because of what one member had described as its "double meaning".

51. On the whole, members had questioned the use of certain terms but offered few suggestions for better ones. Most speakers had said that the expression "other adverse effects" in article 22 was too general and he agreed that it could be deleted. Yet he doubted whether it would be possible to find a single expression to cover all the problems dealt with in article 22. Clearly, both conditions and effects would have to be covered, but he agreed with Mr. Calero Rodrigues (2125th meeting) that the phrase "harmful conditions and other adverse effects" was not entirely satisfactory, since a condition would normally produce an effect. On the other hand, such conditions as erosion, flow obstructions and siltation were themselves the effects of other conditions, which might be directly or indirectly related to a given watercourse.

52. The most important thing was that the problems dealt with in the part of the draft under consideration should be clearly understood by the Commission. He believed that they were and that it was only a matter of deciding whether a general term should be used to describe them and, if so, of selecting the appropriate terminology. The Drafting Committee was well equipped to tackle that problem.

53. It might be that some of the difficulties relating to terminology stemmed from confusion as to the purpose of articles 22 and 23. Article 22 required watercourse States to address two very different kinds of problems: one was chronic, continuing or accumulative, while the other was sudden, short-lived and seriously harmful in most cases. The article required watercourse States to work on the prevention and amelioration of the chronic problems and to take measures to prevent or lessen the effect of the catastrophic ones.

54. Article 23, on the other hand, dealt exclusively with emergency situations, in other words with catastrophic events. The article had two parts: paragraphs 1 to 3 concerned action to be taken in response to an emergency situation, whether it was created by nature or by human conduct, while paragraph 4 required watercourse States to anticipate such situations by jointly developing and implementing contingency plans.

55. It might have been somewhat misleading for him to have said that article 22 dealt with chronic problems, whereas article 23 covered emergency situations. Technically, article 22 dealt with both; it was simply that the measures to be taken under article 22 in relation to floods, ice-jams and other hazards were of an anticipatory and primarily preventive nature, whereas those provided for in article 23 were of an emergency and reactive nature. If that sort of structure was too complex, it could easily be remedied, either by dealing in article 23 with the obligation to prevent floods and similar situations or by making the obligations of preventing and mitigating disasters the

subject of a separate article. If such a change were needed, it could easily be made in the Drafting Committee.

56. Turning to the comments relating specifically to article 22, he said that Mr. Njenga had correctly noted that the list of problems in paragraph 1 was not exhaustive and had pointed out that water-borne diseases had been omitted. He agreed that water-borne diseases should be expressly mentioned, in view of their seriousness in some parts of the world. Generally, however, there should be no attempt to draw up an exhaustive list, especially in a framework agreement, since a number of particularly serious problems would inevitably be omitted. Mr. Illueca's suggestion (para. 15 above) that the words "Without prejudice to other forms of co-operation" be added at the beginning of paragraph 2, in order to make it clear that the forms of co-operation identified in the article were not the only ones that might be envisaged, was a useful one and should be given further consideration.

57. Mr. Calero Rodrigues had suggested that articles 22 and 23 be restructured to deal first with the obligation of notification, secondly with measures to be taken by individual watercourse States and, thirdly, with co-operative action to be taken jointly by watercourse States. He would point out that the fundamental obligation in that field, as revealed in virtually all of the international agreements surveyed, was that of co-operation. It therefore did not seem logical to begin with the means of implementing the fundamental obligation and only later to refer to that obligation itself. He had an open mind on the question, however, particularly if other members of the Commission shared that view.

58. In article 22, paragraph 1, the expression "on an equitable basis" had provoked a number of reactions. Mr. Beesley and Mr. Barsegov (2125th meeting) had supported its use, Mr. Sreenivasa Rao had proposed its deletion, Mr. Díaz González had confessed that he did not understand what it meant in that specific context, Mr. Al-Baharna (*ibid.*, para. 27) had suggested that it be replaced by the phrase "in accordance with the provisions of the present Convention", Mr. Ogiso had said that it should be brought into line with the wording used in articles 6 and 7, and Mr. Calero Rodrigues had asked why a similar expression did not appear in article 23, paragraph 3, on the obligation to co-operate in eliminating the causes and effects of the danger or situation. The idea behind the use of the expression "on an equitable basis" was that all relevant factors should be taken into account in determining the respective "contributions" of each watercourse State to the prevention or mitigation of water-related hazards and dangers. The adoption of such a flexible approach was supported by State practice, as reflected in the treaties reviewed in his report. He would welcome suggestions as to how the idea could be expressed more fully and would have no objection if the expression "on an equitable basis", or similar wording, were included in article 23, paragraph 3.

59. Mr. Reuter (2123rd meeting) had asked about the legal basis for the duty of compensation mentioned in paragraph (3) of the comments on article 22. As other speakers had noted, such an obligation could be based on the general theory of unjust enrichment, but there were limits to that doctrine. If State A took measures principally for the benefit of State B, then State B might well be obliged to make some kind of contribution. If, on the other hand, State A took such measures mainly for its own benefit, there would ordinarily be no duty of compensation. It also seemed obvious that State A could not enrich itself by demanding compensation for measures allegedly taken for State B's benefit when State B had not wished those measures to be taken.

60. Mr. Barsegov (2125th meeting, para. 41) had advocated the inclusion of the phrase "as the circumstances of the particular international watercourse system warrant" in article 22, paragraph 1. He agreed that that might be a constructive change, especially in view of the draft's status as a framework agreement that would have to cover many different types of watercourses and the varying needs of States at different stages of development.

61. The only comments made on article 22, paragraph 2 (*a*), had been that it should be moved to the beginning of the article, that a reference to article 10 (Regular exchange of data and information) should be incorporated, together with a provision for more frequent exchange of relevant data and information and that the word "problems" should be replaced by a better term. He had no objection to any of those suggestions.

62. With regard to paragraph 2 (*b*), several members had referred to the expression "structural and non-structural", and he had already explained that it was used in a number of instruments to refer merely to physical structures such as dams, barrages and embankments which watercourse States might co-operate in building in order to alleviate or prevent water-related hazards. In view of the confusion created by the expression, however, the subparagraph might refer instead to "joint measures, whether or not involving the construction of works. . . ".

63. As to paragraph 2 (*c*), he fully endorsed the suggestion by Mr. Tomuschat (2124th meeting) that it be made more concise and looked forward to receiving specific proposals. Mr. Reuter had suggested the use of the term "pursuance", since the process was of an ongoing nature. He himself had no particular objection to that term, but Mr. Njenga had opposed it. The point was that watercourse States should constantly evaluate the efficacy of the measures they had taken to prevent and mitigate the problems referred to in paragraph 1.

64. Paragraph 3 had elicited numerous comments, many of them favourable. One member had described it as a useful elaboration of article 8 (Obligation not to cause appreciable harm). Another had held that it could not be disputed that land-use management was a necessary ingredient of the kind of co-operation envisaged by article 22 as a whole. However, several speakers had considered that paragraph 3 was unnecessary and that article 8, the general article on not causing appreciable harm, would suffice.

65. Paragraph 3 was of crucial importance, since it drew attention to the interrelationship between human activities and disasters which might otherwise appear to be purely natural in origin and reminded watercourse States of the need to determine whether activities being conducted in their territories would have harmful effects on other watercourse States. He therefore could not understand how it could be said to serve no practical purpose, particularly in view of the effects on watercourses of, for instance, the construction of canals and roads, deforestation and range-management practices. Moreover, recent events pointed to

the urgent need for such a provision, in which connection he would refer members not only to the discussion in his report (A/CN.4/421 and Add.1 and 2, paras. 55-63) of two cases between the United States of America and Mexico and to the United Nations report on the 1988 Bangladesh floods, but also to the front page of the *International Herald Tribune* of 27 June 1989. If the Commission failed to tackle the problem in a forthright manner, it would be deemed to have ignored one of the major environmental problems of the times.

66. On the other hand, he had an open mind about the wording of paragraph 3; if it was thought to be unduly burdensome, some other appropriate wording could no doubt be found. He would have no objection, for instance, to Mr. Barsegov's suggestion to refer to both "individual and collective measures" or to Mr. Sreenivasa Rao's proposal to speak of "all practical measures". It had also been suggested that it was inappropriate to refer to "appreciable" harm in that context and that the standard should be as high as "substantial" or "significant" harm. He had used the word "appreciable" because it was used in article 8, but it might well be that the obligations in question should arise only where the damage resulting from water-related hazards would be more than merely appreciable. Again, he had an open mind on the point.

67. There was a general preference among members who had spoken on the question for the term "territory" rather than the expression "jurisdiction or control", in view of uncertainty about the scope of activities that would be covered by the latter expression. He agreed that the term "territory" should be used both in article 22, paragraph 3, and in article 23, paragraph 2.

68. With regard to article 23, Mr. Reuter had expressed the view that, notwithstanding the *dicta* in the *Lake Lanoux* award,[19] it was now questionable whether States did have unfettered discretion to create risks and had added that the tribunal might have decided otherwise if its decision had been handed down subsequent to the disastrous flood caused when a dam had burst in France shortly after the case had been decided. He agreed with Mr. Reuter that the demands of contemporary international law exceeded the jurisprudence in the *Lake Lanoux* case.

69. Some members believed that a definition of the expression "emergency situation" should be included either in article 23 itself or in the article on the use of terms, although one member thought it would be better not to define the expression, since emergencies were always exceptional and thus defied definition. He personally had an open mind on the matter.

70. He would have no objection in principle to rearranging article 23 to take account of Mr. Tomuschat's suggestion that the duty of prevention, as laid down in paragraph 3, be incorporated in paragraph 1, since the duty to co-operate was based on the duty of prevention and individual action still took precedence over collective measures.

71. There had been no fundamental disagreement among members regarding the principles set forth in paragraphs 1 and 2. A number of suggestions to improve the drafting of paragraph 1 had, however, been made and could be taken into account in the Drafting Committee. It had been asked, for instance, why the term "intergovernmental" was used in paragraph 1 and the term "international" in paragraph 3. His only explanation for the difference was that the term "international" in paragraph 3 had been drawn from the 1982 United Nations Convention on the Law of the Sea, and that the term "intergovernmental" was, in his view, somewhat more precise than "international", which could include non-governmental organizations. He agreed, however, that the two terms should be harmonized.

72. Mr. Pawlak, who considered that paragraph 2 was too narrowly drafted, had suggested (para. 26 above) that the words "other watercourse States" be replaced by "other potentially affected States". That was a useful suggestion and it could be taken into account, along with other drafting suggestions, in the Drafting Committee.

73. Paragraph 3 had been the subject of far more detailed comment. A number of members had rightly noted that States and international organizations which were not parties to the future instrument could not be bound by it. That problem could, as suggested by various members, be solved by redrafting the article to make it clear that non-parties were not so bound. On the other hand, Mr. Illueca had pointed out that States might agree that other potentially affected States should be warned of imminent disasters or situations that might give rise to such disasters.

74. He welcomed Mr. Njenga's suggestion that States which possessed certain kinds of technology, such as remote-sensing capabilities, should be encouraged to assist potentially affected States by sharing data on such matters as flood forecasting. A provision to that effect would, however, require careful drafting to make it clear that it did not purport to bind States not parties to the future instrument.

75. Mr. Ogiso, who considered that the wording of paragraph 3 was too restrictive, had suggested that it be made more flexible so as to cover voluntary assistance in the form, for instance, of food and medicine contributed by non-watercourse States not affected by the disaster. There would be no difficulty in incorporating such a provision in the draft, although it would not be binding on States, but would simply recognize the value of such voluntary contributions. All the other drafting suggestions made with regard to paragraph 3 could be dealt with in the Drafting Committee.

76. There had been no support for the inclusion in the draft of an obligation to accept assistance, particularly in view of the political strings that might be attached. A number of members did, however, think that States should be encouraged to accept such assistance, and the safeguard clause proposed in that connection by Mr. Mahiou (2123rd meeting, para. 46), which would become article 23 *bis*, should be considered by the Drafting Committee. Mr. Bennouna (2124th meeting) had also suggested that provision be made for some modality through which assistance could be rendered and had explained, in private discussions, that such a provision could cover regular or *ad hoc* meetings held by the contracting parties to the future convention to deal with any questions that might arise. That approach had a strong precedent in the General Agreement on Tariffs and Trade, which provided for the Contracting Parties to decide on certain important matters.

[19] See 2123rd meeting, footnote 6.

77. Another point which deserved further consideration and on which an appropriate provision might be included in the draft was the possibility of prior agreement by States on the desirability of offering and accepting assistance, with a view to precluding any difficulties about a possible obligation to accept assistance. Reference had also been made to the improved climate of international co-operation and solidarity, in which connection Mr. Barsegov had stated that it should be supported by legal measures. That, too, was a very positive suggestion and he was very much open to any proposal along those lines.

78. Paragraph 4 of article 23 was based on the 1982 United Nations Convention on the Law of the Sea and that explained its wording. That wording could, however, be reconsidered with a view to making it more binding, as suggested by Mr. Bennouna, who regarded the preparation of contingency plans as the most important aspect of the article.

79. He would suggest that draft articles 22 and 23 be referred to the Drafting Committee for consideration in the light of the discussion. He noted, however, that one member of the Commission, Mr. Díaz González, was of the opinion that more time was required to consider article 22. In that connection, he wished to point out that the same subject had been treated in much the same way in the very report to which Mr. Díaz González had referred, namely the third report by Mr. Schwebel.[20] The matter had also been dealt with in Mr. Evensen's two reports[21] and was therefore not new, having been before the Commission since 1982. It was, of course, possible to defer consideration of the matter until the next session, but he feared that, if it were unduly delayed, the Commission would not be in a position to complete the first reading of the draft articles before the end of its current term of office.

80. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 22 and 23 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.

PARTS VII AND VIII OF THE DRAFT ARTICLES

81. The CHAIRMAN invited the Special Rapporteur to introduce articles 24 and 25 of parts VII and VIII of the draft as contained in the remaining part of his fifth report (A/CN.4/421 and Add.1 and 2), namely in chapters II and III, respectively. Those draft articles read as follows:

PART VII

RELATIONSHIP TO NAVIGATIONAL USES AND ABSENCE OF PRIORITY AMONG USES

Article 24. Relationship between navigational and non-navigational uses; absence of priority among uses

1. In the absence of agreement to the contrary, neither navigation nor any other use enjoys an inherent priority over other uses.

2. In the event that uses of an international watercourse [system] conflict, they shall be weighed along with other factors relevant to the particular watercourse in establishing equitable utilization thereof in accordance with articles 6 and 7 of these articles.

PART VIII

REGULATION OF INTERNATIONAL WATERCOURSES

Article 25. Regulation of international watercourses

1. Watercourse States shall co-operate in identifying needs and opportunities for regulation of international watercourses.

2. In the absence of agreement to the contrary, watercourse States shall participate on an equitable basis in the construction and maintenance or, as the case may be, defrayal of costs of such regulation works as they may have agreed to undertake, individually or jointly.

82. Mr. McCAFFREY (Special Rapporteur) said that, at first glance, the two articles might not seem to be in their logical order, since the subject of article 24 would normally come at the end of a draft. However, as he had stated in his fourth report (A/CN.4/412 and Add.1 and 2), while, as he saw it, the topic should consist of a hard core of certain principles and obligations, there were also other matters, such as that dealt with in article 25, which deserved the Commission's consideration. If the Commission decided that article 25 should have a place in the draft, that article would have to come before article 24.

83. Referring to draft article 24, he said that, historically, of course, navigation had taken precedence over other uses of international watercourses. That, however, was no longer generally the case. None the less, there was a clear interconnection between the navigational and non-navigational uses of watercourses. Accordingly, the only point which paragraph 1 sought to regulate was whether navigation or non-navigational uses should be given priority.

84. Paragraph 2, which was concerned primarily with the non-navigational uses of international watercourses, addressed the question whether a particular use should receive priority over other uses. Although some watercourse agreements listed priorities among uses, that seemed to be an outmoded technique, as he had explained in his fifth report (A/CN.4/421 and Add.1 and 2, para. 126). Accordingly, paragraph 2 provided that no one use should receive priority, but, rather, that all the relevant factors should be weighed with a view to determining, in the event of conflict, which use should prevail or what measures should be taken to resolve the conflict, in accordance with articles 6 and 7 of the draft.

85. Draft article 25 dealt with the subject of regulation, which had a very specific and technical meaning in international watercourse law and was not to be broadly construed. In that particular context, it meant control of the water of the watercourse by the construction of works or other measures with a view to preventing such harmful effects as floods and erosion and maximizing the benefits to be obtained from the watercourse, for instance by regularizing the flow of the water, which could often be of immense benefit for agricultural uses. Since that subject did not lie at the heart of the draft, he had proposed a very

[20] See footnote 10 above.

[21] *Yearbook . . . 1983*, vol. II (Part One), p. 155, document A/CN.4/367; and *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

modest provision designed to draw attention to the importance of co-operation between watercourse States with regard to the regulation of international watercourses. If the Commission decided that the subject deserved more detailed treatment, however, he would be happy to expand on the provision.

86. Mr. KOROMA said that the articles proposed by the Special Rapporteur were most timely and relevant and had his full support. He knew how important the whole topic was for riparian and lacustrine States, since he had had the privilege of representing the Commission at a meeting on the subject held in Addis Ababa in 1988. At the same time, the obligations laid down in the draft articles should not be too restrictive, for otherwise States might be reluctant to comply with them. States should, rather, be encouraged to co-operate in the prevention of harmful effects.

The meeting rose at 12.55 p.m.

2127th MEETING

Wednesday, 28 June 1989, at 3.10 p.m.

Chairman: Mr. Bernhard GRAEFRATH

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

State responsibility (*concluded*)* (A/CN.4/416 and Add.1,[1] A/CN.4/L.431, sect. G)

[Agenda item 2]

***Parts 2 and 3 of the draft articles*[2]**

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLE 6 (Cessation of an internationally wrongful act of a continuing character) *and*

ARTICLE 7 (Restitution in kind)[3] (*concluded*)

1. Mr. McCAFFREY congratulated the Special Rapporteur on his exemplary preliminary report (A/CN.4/416 and Add.1), which contained an extremely thorough analysis of the authorities in the field. He would confine his comments to the general structure proposed for the draft, the legal consequences of an internationally wrongful act, cessation and the new draft article 7 on restitution in kind.

2. With regard to the general structure, the Special Rapporteur advanced cogent arguments for giving separate treatment to provisions on "implementation" (*mise en oeuvre*) and provisions on the settlement of disputes (*ibid.*, para. 4). The analysis he gave (*ibid.*, para. 19) justified placing the rules on implementation in part 2 of the draft rather than in part 3. As Mr. Ogiso had pointed out at the thirty-seventh session, in 1985,[4] a State could only claim, or allege, that an internationally wrongful act had been committed and the legal status of that act was determined only upon completion of the claim, counter-claim or other dispute-settlement process.

3. On the other hand, he was not sure that it was appropriate to give separate treatment to international delicts and international crimes, for he simply could not accept the concept of an international crime of a State and its corollary, penal responsibility of a State. While it was true that violations of international law differed in seriousness, it was also true that they formed a continuum in which it was difficult to identify two distinct categories. Positing a dichotomy between delicts and crimes might, by opening the door to misunderstanding, do a disservice to work on the present topic. There was no doubt that separate treatment should be given to the consequences of the breach of obligations *erga omnes*, but it was precisely there that the Commission could make a real contribution, rather than in vainly pursuing the spectre of a crime of a State. He could not accept the other arguments advanced by the Special Rapporteur (*ibid.*, para. 15) to justify the distinction between two sets of consequences, one for crimes and the other for delicts; the peremptory language he used—"to impose cessation", "to inflict punishment"—did not conform to modern realities. The means of constraint provided for in the Charter of the United Nations were intended to be carried out through the Security Council and the organized international community it represented, not through actions by individual States.

4. The Special Rapporteur's approach to the legal consequences of internationally wrongful acts was the right one and he was correct in saying that "the whole subject-matter should be covered wherever possible in greater detail and depth" (*ibid.*, para. 24). If that intention was carried out, it would make a positive contribution to the elucidation of the subject, for States would be better able to determine

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* Resumed from the 2122nd meeting.

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

[2] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook . . . 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[3] For the texts, see 2102nd meeting, para. 40.

[4] *Yearbook . . . 1985*, vol. I, p. 121, 1895th meeting, para. 30.

the consequences of their actions and of the actions of other States. It was necessary to be as precise as possible in that area and that was exactly what the Special Rapporteur was trying to do.

5. The cessation of an internationally wrongful act must be given separate treatment, as the Special Rapporteur recommended, and not be incorporated in the articles on reparation. As Mr. Calero Rodrigues (2103rd meeting) had pointed out, the subject could well be covered in chapter I (General principles) of part 2. He welcomed the conceptual issue raised in the question whether the obligation of cessation was part of the obligation not to do something or of the consequences of committing an internationally wrongful act. Since the Commission had decided that part 1 of the draft would be concerned with the origin of international responsibility, it would be appropriate, if only for that reason, to include cessation in chapter I of part 2, especially as it appeared to involve a new obligation on the part of the State which had committed an internationally wrongful act.

6. Turning to the new draft article 7 of part 2, he said he agreed with Mr. Calero Rodrigues that what was meant by "restitution in kind" had to be defined in paragraph 1. That would obviate the need to expand on the concept in the commentary and ensure that what the Commission meant was clearly spelled out. As the Special Rapporteur stated (A/CN.4/416 and Add.1, para. 64), there were two different views, namely that restitution in kind meant re-establishing the *status quo ante* or that it meant re-establishing the situation which would have existed if the wrongful act had not been committed.

7. Paragraph 1 (*c*) of article 7 raised the thorny problem of "excessively onerous" restitution. The expression was not especially felicitous and it would have been better to use the words "disproportionate burden", mentioned by the Special Rapporteur in his quotations from the literature (*ibid.*, para. 99). The Drafting Committee could have resolved such a minor point had it not raised a major problem: the article would then have to list the cases in which restitution in kind was considered "excessively onerous", and that was tantamount to apprising a State that had committed an internationally wrongful act of the loopholes through which it might escape a claim by the injured State.

8. Two formulations were proposed in paragraph 4: "reparation by equivalent" and "pecuniary compensation". He preferred the second expression for the simple reason that it was more understandable to the average lawyer. Furthermore, pecuniary compensation was in fact the chief form of reparation by equivalent. Finally, "reparation by equivalent" sounded very awkward in English.

9. With regard to the organization of work, it would be very useful if the Special Rapporteur could be given an opportunity to introduce his second report before the end of the current session, in order to facilitate its study by members before the next session.

10. Mr. BARBOZA noted that, in his preliminary report (A/CN.4/416 and Add.1, para. 64), the Special Rapporteur proposed two ways of defining restitution in kind: "definition A" involving re-establishment of the *status quo ante*; and "definition B" involving re-establishment of the situation which would have existed if the wrongful act had not been committed. Those two definitions related to different moments in time—the moment when the violation took place and the moment of reparation, which was really the more important. If definition A were retained, all the consequences of the act would not have been wiped out at the moment of reparation: what about the interest on a sum of money claimed by the injured State, for example? That State might regard it as the subject of a new claim. Even if adopting definition B meant introducing a situation which had never existed, it would be better to do so if the possibility of integral compensation was to be preserved.

11. The relationship between cessation and restitution caused no difficulty, in his opinion, as both belonged to the secondary rule. He did not share the Special Rapporteur's view that cessation was a continuing effect of the original legal relationship, nor could he agree with him in situating cessation "in between" primary and secondary rules (*ibid.*, para. 61). Making cessation an effect of the primary rule and restitution an effect of the secondary rule would be conceptually illogical, for two States would then be linked at the same time by one legal obligation of cessation imposed by the primary rule and another of reparation imposed by the secondary rule as a consequence of the violation of the first. It must be recalled that a legal obligation was nothing more than a legal link, while its content was an entirely different thing. A primary obligation had no strength, as it was logically impossible to comply with. Once it had been violated it was extinguished, because it could not possibly be fulfilled, since the time element was essential: before time T, the obligation had not been violated; afterwards, it had. There was no third possibility: an obligation was either complied with or violated. Consequently, cessation presupposed violation.

12. The origin of the confusion was that cessation was always linked to a continuing act, the interruption of which provoked the illusion that the primary obligation had been complied with. In fact, however, it had not, because the time element was essential to the fulfilment of the obligation. The following example might serve as an illustration: in the case of diplomatic agents being taken hostage, the content of the primary obligation was that of not interfering with the freedom of persons protected by their diplomatic status. Once they had been taken hostage, however, that obligation could not possibly be fulfilled: having effectively been violated, it belonged to the past. In such cases, the law therefore imposed a second obligation, that of cessation. In the case of hostages, the obligation of cessation did not even have the same content as the primary obligation, since the release of the hostages required a positive conduct, whereas the content of the primary obligation had been an abstention. The first legal link, which had its own source, namely the 1961 Vienna Convention on Diplomatic Relations, no longer existed. It was replaced by the new obligation that would be imposed by the articles on State responsibility, together with some other elements designed to wipe out the other factual consequences of the violation, such as the interest that accumulated when a creditor was deprived of capital owed to him by a debtor who had defaulted, or injury to diplomatic hostages and damage to embassy premises.

13. Even if both cessation and restitution belonged to secondary rules, they must be conceptually separated. Although restitution implied cessation, it was different. The fact that both occurred at the same time did not mean that

cessation was absorbed by restitution or "telescoped" into it, as the Special Rapporteur had suggested. Returning to the example of hostage-taking, he said that, if the hostages were delivered to the State claiming them, the wrongful act certainly ceased; but it might also cease if the hostages were simply released, even if that act led to their death, for example if they were left to the fury of a mob.

14. Lastly, he was in general agreement with the Special Rapporteur's analysis of the question of the impossibility of restitution in kind (*ibid.*, paras. 85-90).

15. Turning to the new draft article 7, and more specifically to the concept of "excessively onerous" restitution, he said that paragraph 2 (*a*) and (*b*), which brought out that idea, related to two different elements. Subparagraph (*a*) seemed to be the application of the principle of "reasonableness", which was one of the sure guides in the application of the law. Subparagraph (*b*) dealt with something entirely different: a situation similar to that of a "state of necessity", but with the difference that, instead of precluding the wrongfulness of an act of a State not in conformity with its international obligations, the provision relieved the State of its obligation of restitution in kind. Subparagraph (*b*) therefore seemed inappropriate: its content related more to paragraph 1 (*b*) of article 33 (State of necessity) of part 1 of the draft, as provisionally adopted by the Commission on first reading. If paragraph 2 (*b*) of draft article 7 were deleted, the article as a whole would be acceptable.

16. As to the new draft article 6, he had no objection to separate treatment of cessation as long as it was clearly understood that, together with restitution, it was a form of reparation. To that end, the Commission might consider using the more explicit formula "without prejudice to the *other* responsibility it has already incurred", in order to make it clear that cessation was *also* a responsibility, and not a primary obligation. The word "remains" should be replaced by "is", and the words "action or omission" could be replaced by the word "act", which covered both ideas.

17. Mr. SOLARI TUDELA said that the reasons the Special Rapporteur had given for according separate treatment to the consequences of international delicts and those of international crimes were primarily methodological and, as he stated in his preliminary report: "If the results were to prove that the separation could partly be dispensed with, reverting to more or less integrated texts would remain a matter of drafting." (A/CN.4/416 and Add.1, para. 12 (*b*).) In those circumstances, it would be useful to know whether the Special Rapporteur intended to draw a distinction, in the chapter of the draft on the consequences of an international crime, between international crimes and crimes against the peace and security of mankind and to deal with the different consequences in those two cases, particularly in respect of reparation.

18. It was to the question of cessation that the Special Rapporteur attached the greatest importance, drawing a distinction in that connection between cessation and restitution in kind from the standpoint both of their nature and of their function. The Special Rapporteur's view was that cessation had its source in primary rules and restitution in secondary rules. Doctrine and practice did not, however, always distinguish between those two concepts. Referring from the point of view of internal law to the case of the arbitrary detention of an individual by the authorities of a State, he said that, in a State which was not subject to the rule of law, the individual's release—or, in other words, the cessation of the wrongful act—would be considered sufficient, whereas, in a State which was subject to the rule of law, the release would not be the last of the case, since the injured individual would be entitled to claim compensation from the State. It appeared that the same was true in public international law; that the difference between cessation and restitution would become increasingly marked as the international community of law grew stronger; and that the breach of an international obligation would lead more and more frequently not only to the cessation of the wrongful act, but also to reparation in due form. State practice already offered examples to illustrate those two aspects of responsibility. Some years previously, the Israeli authorities had arranged for the kidnapping in Argentine territory of the former Nazi, Adolf Eichmann, whom they had accused of the crime of genocide. As was known, Eichmann had subsequently been tried, found guilty and executed in Israel. But it would also be recalled that the Israeli Government had not denied having committed a breach of an international obligation by failing to respect Argentina's sovereignty, and had presented to the Government of that country a note to that effect which it had regarded as the equivalent of reparation.

19. The distinction between those two aspects of international responsibility and their independence from each other were, in his view, not in doubt and devoting a separate article to cessation was therefore justified. But was it the Special Rapporteur's intention to leave the new article 6 on cessation in chapter II of part 2 of the draft, on the legal consequences deriving from an international delict, or to include it in chapter I (General principles) (*ibid.*, para. 20)?

20. With regard to restitution in kind, the Special Rapporteur had made a very detailed analysis of doctrine and the practice of States. According to the report (*ibid.*, para. 64), there were two main tendencies in the doctrine: one in favour of re-establishing the situation which had existed prior to the wrongful act and the other in favour of re-establishing the situation which would have existed if the wrongful act had not been committed. Although the Special Rapporteur apparently favoured the second of those schools of thought, that preference was not reflected in the new draft article 7. Referring in connection with that article to the question of nationalization measures (*ibid.*, para. 106) and the impossibility of restitution in kind in such cases, the Special Rapporteur pointed out that contemporary doctrine questioned the right to restitution in that field. Since nationalization was a lawful act and State responsibility related to wrongful acts, the conclusion to be drawn was that nationalization as such did not come within the scope of responsibility. The fact nevertheless remained that a State which was indemnified in the event of nationalization could have problems with regard to the amount of compensation.

21. In his view, the text of draft article 7, and paragraph 3 in particular, might give rise to difficulties. However justified the rule embodied in that provision might be, it was not certain that it would be accepted, in view of past experience in other areas of law. In the case of wrongful acts which violated their internal law, States were often

prevented from enforcing the law by obstacles imposed by the internal legal system of another State. In the case of an internationally wrongful act would they accept a rule as rigorous as that contained in article 7?

22. Mr. FRANCIS, referring to the general issues dealt with in the introduction and in chapter I of the preliminary report (A/CN.4/416 and Add.1), said that he agreed with the Special Rapporteur's approach to the revision of articles 6 and 7 of part 2 of the draft. He sympathized, in particular, with the emphasis on the question of cessation, in other words on the obligation of the author State, and with the idea of devoting a separate article to the rights of the injured State. He also agreed with the way in which the Special Rapporteur proposed to deal with the question of international delicts and international crimes, on the understanding that the Commission would eventually come back to the issue to see whether the two approaches envisaged could perhaps be reconciled. He would in due course give his views on whether the Commission should be guided by Mr. McCaffrey's comments and referred in that connection to article 19 (International crimes and international delicts) of part 1 of the draft, provisionally adopted by the Commission on first reading.

23. Articles 1 to 5 of part 2 of the draft could indeed constitute a chapter I of that part, entitled "General principles" (*ibid.*, para. 9), but once the Commission had finally adopted those articles, the right place for article 5 would, in his view, be under the heading "Use of terms". The provision was essentially interpretative in nature and had no bearing on general principles. He agreed with Mr. Calero Rodrigues (2103rd meeting) that the new draft article 6 on cessation should be included among the general principles.

24. As to the outline for parts 2 and 3 of the draft proposed by the Special Rapporteur (A/CN.4/416 and Add.1, para. 20), he agreed with Mr. Yankov (2105th meeting) on the need to define the elements to be included in part 3, on the peaceful settlement of disputes.

25. He fully agreed with the Special Rapporteur's analysis and conclusions on cessation (A/CN.4/416 and Add.1, paras. 22, 31 and 61). Cessation as a consequence derived mainly from a primary obligation and, in that sense, was not really a legal consequence, but a factual consequence of an internationally wrongful act. Unlike the other consequences, it did not derive from the new legal relationships arising out of the breach of an international obligation. In the case of a State whose accidental breach of an international obligation was discovered and remedied by its own organs, cessation was not, strictly speaking, a legal consequence of the same kind as the other consequences deriving from the breach.

26. If he had understood him correctly, Mr. Bennouna (2122nd meeting) took the view that cessation corresponded to restitution. That was true in some cases where cessation was a means of remedying the breach, but cessation nevertheless differed from restitution as such in that it depended on the breach of the international obligation itself. If a State bombed a neighbouring State and then stopped doing so, it could be required to make reparation in the event of injury, but certainly not to provide restitution in kind. That was why the Special Rapporteur was right in saying that "a rule on cessation could well be conceived as a provision situated, so to speak, 'in between' the primary rules and the secondary rules" (A/CN.4/416 and Add.1, para. 61).

27. Referring to the drafting of the new article 6, and in particular of the expression "an internationally wrongful act [having] [of] a continuing character", he said that the Special Rapporteur should pay greater attention to article 25 of part 1 of the draft, entitled "Moment and duration of the breach of an international obligation by an act of the State extending in time".

28. On the question of excessively onerous restitution, referred to in paragraph 1 (*c*) of the new draft article 7, he thought that it would be useful to bear in mind the spirit of articles 31, 32 and 33 of part 1, relating to *force majeure* and fortuitous event, distress and state of necessity, which did not preclude the wrongfulness of an act if the author State had contributed to the occurrence of the situation. Article 7 should indicate that, if the excessively onerous character of restitution was a consequence of the breach, the author State should not derive any advantage from it.

29. Draft article 7 of part 2 as submitted by the previous Special Rapporteur had given rise to a variety of reactions and he, too, had reservations about it, particularly with regard to the question of resident aliens, which should be approached cautiously and in the light of what was happening in the world. Coming as he did from a small country which had a population of only just over 2.5 million and from which another 1 million had emigrated, he was particularly sensitive to that issue. When a breach of an international obligation involving resident aliens occurred, the important thing was to find a legal solution based on humanitarian concerns which would help to improve the lot of the persons involved in the new situation arising out of the breach—an altogether different matter from restitution.

30. Mr. SHI paid tribute to the efforts made by the Special Rapporteur, who generally accepted the outline of parts 2 and 3 of the draft proposed by his predecessor, while imprinting on it his personal perception and making certain changes for reasons of methodology. New draft articles 6 and 7 of part 2 had thus been submitted to replace those already referred to the Drafting Committee, and that was a perfectly natural procedure.

31. The revised outline proposed by the Special Rapporteur in his preliminary report (A/CN.4/416 and Add.1, para. 20) differed from the original outline in three major respects. First, two separate chapters of part 2 were proposed for the legal consequences of international delicts and those of international crimes. Secondly, in the treatment of each of those categories, the Special Rapporteur drew a distinction between substantive and instrumental or procedural consequences. Thirdly, he devoted all of part 3 to the peaceful settlement of disputes arising out of an alleged internationally wrongful act. It could be asked whether the proposed changes were justified. In his report (*ibid.*, paras. 16 and 18), the Special Rapporteur stressed that the suggested changes were purely a matter of method and did not imply any attempt on his part to take a stand on any of the practical or theoretical issues involved. But was it possible to separate methodology from theoretical or doctrinal issues? For example, the Special Rapporteur concluded that the legal consequences of delicts and those of crimes had to be treated separately because it was difficult to find a "lowest common denominator". In draft article 14 of part 2 as referred to the Drafting Committee, however, his predecessor had admitted, at least implicitly, the existence of

a common denominator in the legal consequences of internationally wrongful acts, with the exception of the most serious crimes, which, according to him, had their own legal consequences. The difference in treatment was thus determined not merely by method, but rather by a difference of view on theoretical issues. It would be premature for the Commission to take a decision on the changes proposed by the Special Rapporteur until he had submitted all the reports and draft articles relating to parts 2 and 3 of the draft.

32. With regard to the new draft article 6, he agreed with the Special Rapporteur that cessation should be dealt with separately from the provisions on reparation and found the arguments to that effect generally convincing. A few comments, however, were called for.

33. First, the Special Rapporteur stated (*ibid.*, para. 31) that cessation pertained to the wrongful act itself, rather than to legal consequences; that, in that sense, it was not one of the forms of reparation; and that, as an obligation and as a remedy to a wrongful act, it was to be ascribed to the continued, normal operation of the primary rule of which the wrongful act constituted a violation, not to the operation of the secondary rule coming into play as an effect of the occurrence of the wrongful act. He could not fully share that view. Like other members, he regarded cessation and restitution in kind as forms of reparation which were often combined. That was so, for example, in the case of demands by injured parties for the evacuation of a territory, the release of hostages or the restitution of objects. The Special Rapporteur was apparently aware of the difficulty of maintaining an extreme position, since he stated (*ibid.*, para. 32) that cessation fell, nevertheless, among the legal consequences of a wrongful act in a broad sense. Those were difficult theoretical issues and he agreed with Mr. Yankov (2105th meeting) that the distinction between cessation and reparation, or restitution in kind in particular, should not be taken too far.

34. Secondly, the Special Rapporteur drew a distinction between a wrongful act having a continuing character or extending in time and an instantaneous wrongful act, adding that cessation was important only in the former case. The problem lay in the definition of a wrongful act of a continuing character and the criteria to be used for such a definition. The Special Rapporteur recalled (A/CN.4/416 and Add.1, para. 34 *in fine*) that, in explaining the distinction between a continuing wrongful act and an instantaneous wrongful act in the commentary to article 18 of part 1 of the draft, the Commission had stressed that the former was "a single act [which] extends over a period of time and is of a lasting nature", while the latter was "an instantaneous act producing continuing effects", such as an act of confiscation, in connection with which the Commission had indicated that "the act of the State as such ends as soon as the confiscation has taken place, even if its consequences are lasting". The Special Rapporteur disagreed with the Commission on that point and supported the views of the former Special Rapporteur, Mr. Ago, and of H. Triepel (*ibid.*, paras. 35-37). Yet the definition defended by Triepel, when applied, for example, to the nationalization of certain alien property, could entail intolerable consequences for the nationalizing State. A number of States still insisted today on the so-called international standard of nationalization, as conceived in traditional international law, a breach of which would constitute a wrongful act having a continuing character in the form of an illegal take-over of foreign property. According to the Special Rapporteur's logic, that would call for cessation of the act, in other words denationalization. As the Special Rapporteur explained (*ibid.*, para. 57), cessation—unlike reparation, and more specifically restitution in kind—admitted of no exceptions. In such a case, therefore, the demand for cessation could threaten or jeopardize the social and economic system of the State concerned. The point was one which the Special Rapporteur should take into consideration.

35. As to the role of cessation in "omissive" wrongful acts, he did not object to its inclusion in draft article 6, but, like some other members—in particular Mr. Barboza (2102nd meeting) and Mr. Tomuschat (2104th meeting)—he doubted whether the demand of an injured State for the performance of the original obligation to act could be called cessation. Moreover, the Special Rapporteur admitted that there was uncertainty in the matter, both in doctrine and in practice.

36. The new draft article 7 on restitution in kind was also acceptable on the whole, but again called for a few comments. In the first place, in his analysis of the concept of restitution in kind, the Special Rapporteur identified two main interpretations (A/CN.4/416 and Add.1, para. 64): on the one hand, re-establishment of the *status quo ante*, and on the other, re-establishment of the situation which would have existed if the wrongful act had not been committed. There was nothing in article 7, however, to indicate which of the two concepts he preferred. That was an important point, since the two definitions had quite different implications, as indeed the Special Rapporteur recognized (*ibid.*, para. 67). For his own part, he would prefer to view restitution as the re-establishment of the *status quo ante*.

37. The Special Rapporteur treated the question of impossibility—whether material impossibility, legal impossibility or excessive onerousness—as a limit to restitution in kind. In the case of legal impossibility, the Special Rapporteur recognized only impossibility which derived from a peremptory norm of general international law. Accordingly, under paragraph 3 of article 7, States were precluded from using obstacles deriving from their internal law as an excuse for non-compliance with the obligation of restitution in kind. As a general principle, that proposition was justified, but that did not mean that obstacles deriving from internal law should be disregarded altogether. He agreed with those members who had pointed out that it would sometimes be difficult, if not impossible, to set aside or rescind the decisions of domestic courts, especially those of the higher courts. Under the legal systems of some States, of course, Governments could intervene in court proceedings if they considered that a treaty obligation was in danger of being violated. At the same time, however, it might be constitutionally impossible for a Government to extricate itself from the decision of a higher court. That would be a clear case of legal impossibility of restitution in kind. Moreover, the Special Rapporteur acknowledged that difficulties arising from domestic law sometimes had to be taken into account, particularly in the case of expropriation; but he viewed that not as a matter of domestic legal impossibility, but rather as a matter of impossibility deriving from excessive onerousness such as would seriously jeopardize

the political, economic or social system of the State. However, if the act of expropriation was regarded as an act of a continuing character—in the sense understood by the Special Rapporteur earlier in his report (*ibid.*, paras. 35-37)—then cessation would be called for and there would be no exception in that regard. Once again, the issue of the distinction between cessation and restitution arose.

38. Finally, he agreed with the Special Rapporteur that there was no need for a special régime for wrongful acts affecting the treatment of aliens. Draft article 7 as submitted by the previous Special Rapporteur should therefore be deleted. The reasons advanced by the Special Rapporteur (*ibid.*, paras. 104-108), particularly with regard to the irrelevance of the distinction between "direct" and "indirect" injury to a State, might be sufficient to warrant that deletion. But that distinction remained important to the régime of State responsibility so far as the treatment of aliens was concerned. Because of the distinction, it was not lawful for States to espouse the claims of their citizens before local remedies had been exhausted or where there was no manifest denial of justice.

39. Mr. DÍAZ GONZÁLEZ said that, as the draft articles submitted by the Special Rapporteur were to be referred to the Drafting Committee, he would, to save time, make known his views on points of drafting and substance in the Committee.

40. Mr. ARANGIO-RUIZ (Special Rapporteur) thanked the members of the Commission, who, whether they agreed or disagreed with his proposals, had all provided him with precisely the guidance he had requested. In summing up the discussion, he would follow the order adopted in his preliminary report (A/CN.4/416 and Add.1), starting with the proposed outline for parts 2 and 3 of the draft and proceeding to consider first cessation and then restitution in kind.

41. With regard to the proposed outline (*ibid.*, para. 20), he noted that almost all members who had spoken on the topic had referred to the relationship between international delicts and international crimes. As he had explained, he proposed to deal with delicts and crimes separately simply because, in his view, delicts were better known and less difficult to deal with, whereas crimes represented, at least for him, a far less known and much more difficult area. As a matter of principle, he had nothing against the "in addition" device (*ibid.*, para. 11). However, given the development of international law and the distinction between international delicts and international crimes made in article 19 of part 1 of the draft, it seemed rather odd to him to deal indiscriminately from the outset with both categories of internationally wrongful acts subject to one single difference, as represented by the "in addition" formula. He continued to believe that, only after he had dealt in depth with delicts would he be able to serve the Commission properly in the most difficult part of its task, namely the devising and formulation of a régime applicable to the particular consequences that attached or ought to attach to crimes, within the framework of the progressive development of international law.

42. Of course, at certain points in the draft articles which he had prepared thus far—including those he would submit in his second report—there were elements which could perhaps apply more or less perfectly for crimes and for delicts. But he was not confident enough to commit himself to such a conclusion. For instance, he had stated in his preliminary report that the rule on cessation and its treatment in a separate article might prove to be even more important for crimes than for delicts, and the same observation applied to satisfaction, which would be dealt with in the second report. He was not sure about all the implications, however. Satisfaction, for example, might not be appropriate, in all its forms, as reparation for a crime. Nor was he sure at the present initial stage in his work as Special Rapporteur in what measure, under what conditions and in what form or forms satisfaction would be due in the case of any delict. It would be less simple to settle any differences of view if the resulting article were to deal at one and the same time not only with delicts, but also with crimes. Mr. Koroma (2105th meeting), who had seen that difficulty, had alluded to the need to explore the "grey area" of wrongful acts situated between the area of delicts and that of crimes, while Mr. Barsegov (2104th meeting) had pointed out that, in national criminal codes, the legislator defined the breaches and then indicated the penalty as a function of the gravity of the breach. But, as Mr. Barsegov had stressed, the Commission was dealing with internationally wrongful acts. Consequently, he (the Special Rapporteur) did not think that it was defining breaches—or primary rules—in that case or laying down penalties, as in a national criminal code: there were international delicts on the one hand, and international crimes on the other, and in neither case was there available a clear and uncontroversial definition of specific wrongful acts (except for certain broad and ill-defined categories of crimes), or of penalties to be applied for crimes, or of any mechanism for punishment. Nor did he believe it would be so easy to transplant into international law models that were typical of national criminal law. He, for one, was not able to do so right away as easily as Mr. Barsegov had seemed to suggest.

43. According to Mr. Graefrath (*ibid.*), no punishment of any kind, not even punitive damages, should actually be envisaged. Moreover, Mr. Barsegov had said that it was not clear to him whether *restitutio* could apply in the case of international crimes. It would apply to some degree, but it was also quite possible that not all the provisions of the new draft article 7 of part 2 would apply equally to crimes and delicts. It therefore seemed preferable for the Commission first to reach a decision on the legal consequences of delicts, as proposed in article 7, and then to see how they might be adapted to crimes.

44. He believed that Mr. Bennouna (2122nd meeting) agreed with his analysis of the distinction between international delicts and international crimes, although he might have gone too far into the consequences. According to Mr. Bennouna, article 19 of part 1 introduced a complication in the codification of the topic in that it involved categories of criminal law completely unrelated to international realities and would create difficulties in connection with the punishment of crimes. In other words, Mr. Bennouna, who rightly stressed the difficulties of the topic, seemed to want to do away with article 19. Personally, he had no intention of doing so, for the very reasons, *inter alia*, which made Mr. Barsegov anxious to see the consequences of crimes set out forthwith. Mr. Graefrath agreed in principle with the method he had adopted—namely with the distinction in question—but was worried that separate provisions for crimes might be formulated in terms of punishment,

for in his view it would be misconceived to interpret the régime applicable to the most serious violations of international obligations as a kind of criminal responsibility. He could not agree with that view and would remind members that, according to the former Special Rapporteur, Mr. Ago, and a number of other scholars, the consequences of an internationally wrongful act were not limited exclusively to reparation. In any form of reparation there was, in addition to a purely compensatory element, a punitive element and, as was apparent from diplomatic practice, that applied even in the case of delicts. But he did realize the difficulty of conceiving punishment for a State—let alone of inflicting punishment on it. Three large States had indeed been punished at the end of the Second World War, but that punishment had consisted in defeat on the battlefield and had actually been the premiss for the punishment of individual crimes against peace and against humanity. In that connection, however, Mr. Tomuschat (2104th meeting) had rightly pointed out that certain limits to the possibilities of reparation should be considered in the interests of peoples, since a State could not be punished without punishing its people. Some form of punishment—of coercive measures—would, however, have to be envisaged. It was quite clear, for example, that, in the case of delicts, satisfaction was a form of punishment, although in that case the punishment was, in most of its forms, demanded by the injured State and it was the offending State which, in a sense, punished itself.

45. The distinction between delicts and crimes would also have to be made with regard to cessation. The provision in respect of crimes would have to be stated in much stronger terms than in the case of delicts or other internationally wrongful acts.

46. The second main question of method concerned the distinction between, on the one hand, substantive consequences, in terms of reparation and forms thereof, and, on the other, measures, in the sense of countermeasures, which he understood as being essentially instrumental in securing cessation, restitution in kind, pecuniary compensation and satisfaction. Such measures were subject to certain preconditions, which could be termed "pre-measures", as represented by the steps the injured State should take before resorting to measures. They were part of "implementation" (*mise en oeuvre*) and, although the previous Special Rapporteur had dealt with them in part 3 of the draft, he would prefer to place them in part 2, alongside measures. That was the third point on which he had departed from the outline proposed by his predecessor. It seemed to him that the last two questions of method—the distinction between the substantive consequences and the instruments used to secure them, and the distinction between measures and "pre-measures"—were less controversial than the distinction between delicts and crimes. Only one speaker, Mr. Graefrath, had expressed reservations concerning the distinction beween substantive and procedural consequences, and very few had done so concerning his conception of implementation or, in other words, "pre-measures".

47. Mr. Graefrath had accepted the first of those distinctions on condition that it was not regarded as absolute and he was quite ready to agree on that point. Of course, reparation was not exclusively substantive and measures were not exclusively procedural. Mr. Graefrath was concerned, as with regard to the distinction between crimes and delicts, that such a distinction would lead to the "criminalization" of States for serious violations. On that point, he (the Special Rapporteur) considered—and Mr. Razafindralambo (2102nd meeting), among other members, seemed to share his view—that reparation was mainly substantive and acquired a procedural character, for example with regard to satisfaction or punitive damages, only where there was wilful intent or negligence—in which event it then came close to punishment, as in the case of the most serious forms of delicts and, *a fortiori*, of crimes. Measures were mainly instrumental and, in that sense—but only in that sense—were procedural, for they were not an end in themselves, but served a purpose, which was to make reparation or to punish. To regard them as substantive would be to imply that they were always punitive and an expression of revenge, and a right of the injured State. He would prefer to regard them as the instruments to be resorted to for a certain purpose, namely to secure reparation for the most common delicts and perhaps punishment for more serious acts.

48. With regard to implementation and the way in which he conceived part 3, his intention to place "pre-measures" in part 2 and only dispute settlement in part 3 appeared to have been approved by a number of speakers, including Mr. Razafindralambo, Mr. Calero Rodrigues (2103rd meeting) and Mr. Al-Qaysi and Mr. Al-Khasawneh (2122nd meeting). His approach was based on the belief that the steps taken by States as pre-conditions for the lawfulness of measures had to be considered at the same time as the measures themselves. He failed to see how measures could be dealt with without making it clear within the same context in what cases and in what circumstances measures could not be resorted to without some prior steps. As to the question whether the provisions concerning such conditions should be placed before or after those relating to measures such as reciprocity or reprisals, it would seem reasonable that they should come immediately after them, in order to indicate the general conditions for the lawfulness of those measures. To relegate those conditions to part 3, as if they represented a minor matter of implementation, could be dangerous. It must be made clear that immediate resort to measures by an allegedly injured State on the mere basis of an exclusive, sovereign unilateral opinion, without even an exchange of diplomatic notes, should not be the rule. In that connection, he strongly disagreed, as a matter both of codification and of progressive development, with the well-known sweeping *dictum* of the arbitral tribunal in the *Air Service Agreement* case.[5] With all due respect to the eminent arbitrators who had handed down that award, he found that it left the door far too wide open for practices which only the "powerful" could afford and which the Commission would do well to condemn.

49. Although it was very unlikely that part 3 of the draft would contain revolutionary steps forward in the area of the peaceful settlement of disputes, he would do his best to revive the proposal he had submitted on behalf of Italy, together with the Netherlands, Japan, Madagascar and

[5] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978 (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 417).

Dahomey (now Benin), during the unsuccessful negotiations on the formulation of the principle of the peaceful settlement of disputes in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[6] He also recalled the protest document which he had submitted to the Committee entrusted with the drafting of that instrument precisely because the principle of peaceful settlement had been obstinately understated in the formulation that had finally prevailed. It was, however, necessary to be realistic in considering the problem of third-party settlement procedures in the context of a set of articles on responsibility. It should not be overlooked that the acceptance by States of any compulsory third-party settlement procedure in such a wide area as that of State responsibility would imply their subjection to such procedure for the alleged breach of *any* obligation deriving from *any* rule of international law in *any* field, however serious the conflict of interests involved. It would clearly be very difficult for States to accept such a heavy commitment.

50. Concluding his comments on the proposed outline, he noted that Mr. Yankov (2105th meeting) and Mr. Francis had rightly stated that the outline was precise and detailed for part 2 of the draft, but not for part 3, only the title of which was given. He explained that that was due not to negligence, but to the fact that he was proceeding step by step and that, for the time being, he was not sure exactly what the structure of parts 2 and 3 would be or exactly what they would contain.

51. Another comment had related to the submission of reports. He agreed that the reports should be submitted on time and stressed that he had taken all necessary steps to avoid any delay. At the same time, he could not be expected to cover in one stroke, i.e. in one report, all the questions dealt with in draft articles 6 to 16 of part 2, which were now before the Drafting Committee. The topic of State responsibility was an enormous one and so, too, was his responsibility to the Commission and to the Sixth Committee of the General Assembly. The rules which would ultimately be embodied in the draft articles, and possibly in a convention, would cover the breach of any rule of international law and would continue to be in force for a long time after their adoption. Moreover, any set of draft articles prepared not only by the Commission, but also by a special rapporteur, attracted the attention of Governments and scholars long before it had taken its final shape and sometimes even before its first reading had been completed. Much to his regret, he believed that, despite their undeniable merits, the draft articles to which he had just referred were still unsatisfactory from the point of view of the codification and progressive development of the law on the topic. The amount of material collected so far and still to be collected and analysed was huge: a sample was to be found in his preliminary report, and a more substantial sample, on compensation, damages, interest and satisfaction, was contained in the forthcoming second report, which would complete the consideration of the question of reparation. The Commission would therefore not be justified in saying that it had before it only the first two draft articles on the substantive consequences of an internationally wrongful act, because it could already have a fairly detailed general idea of all of those consequences. At the next session, it would have before it draft articles on measures and "pre-measures" and, hopefully at the following session, draft articles on the consequences of crimes.

52. Turning to the question of cessation, he noted that three issues had been raised: its nature and relationship to reparation; the placing of the provisions relating to it in the draft; and the wording of the new draft article 6.

53. On the first point, he noted that his tentative definition of cessation as distinct from reparation had been questioned by Mr. Barboza and, to a lesser extent, by Mr. Tomuschat and Mr. Bennouna. He believed, however, that what those members had said did not contradict his own position. He recalled that he had admitted that the obligation to cease the wrongful act, while deriving from the original primary rule, was also a consequence of the fact that the breach of that rule had already commenced; in that sense, the obligation of cessation was in a broad sense a consequence of the wrongful act. That was the point he had tried to explain in his preliminary report, while stressing that cessation was often not visible because it was absorbed into restitution in kind. He therefore did not deny that cessation presupposed the commencement of the wrongful act: that was absolutely obvious.

54. Of course, he had not failed to draw the Commission's attention to the telescoping between remedies which occurred in practice before arbitral tribunals, a point which Mr. Hayes (2105th meeting) and Mr. Al-Qaysi had well understood from the report. His reference in that connection to the *SNCF* case (A/CN.4/416 and Add.1, footnote 59) had been particularly well understood by Mr. Al-Qaysi and should not be construed in the manner suggested by Mr. Barboza (2102nd meeting).

55. It should, however, be pointed out that that process of absorption of cessation into reparation did not always occur and that in some cases—one illustration being the case concerning *United States Diplomatic and Consular Staff in Tehran*[7]—cessation definitely took first place. Surely it was possible to imagine other situations in which cessation would be the main concern of the interested Government: for example, the gradual extension of the occupation of a territory or the gradual restriction of the rights and freedoms of aliens in a State in violation of treaty law or general international law or, again, a continuing violation of human rights which was attributable to, or consubstantial with, a régime and therefore constituted a permanent and systematic violation of treaty law or general international law.

56. As to the distinction between "primary" and "secondary" rules which some speakers had accused him of calling into question, he stressed that it was precisely on that distinction that he had based the separate, although not necessarily isolated, role of cessation. Of course, he did not want to make a fetish of that distinction and it was for that reason that he had spoken of a "grey area". If some passages of his report, as cited by Mr. Solari Tudela and Mr. Shi, might have created doubts on that point, those doubts should be dispelled by paragraph 32 of the report. In that connection, Mr. Shi's comment on the question of

[6] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[7] See 2104th meeting, footnote 7.

nationalizations as seen from the point of view of cessation and restitution was very relevant and he had taken careful note of it.

57. With regard to the location of the provisions on cessation, he believed that they should come before those on the various forms of reparation, but after part 1 of the draft. He was therefore in favour of Mr. Calero Rodrigues's suggestion that they should be included among the general principles in chapter I of part 2.

58. On the wording of the new draft article 6, he pointed out that he had used the word "remains" rather than "is" in order to stress the permanence of the State's obligation and the lasting nature of the primary rule, which no number of breaches should cause to disappear.

59. The wording proposed by Mr. Graefrath for article 6 (2104th meeting, para. 31), which amounted to saying that the State which was the author of the act was bound by the obligation of cessation subject to a claim by the injured State, would have the defect of weakening the rule stated in the article. He had actually considered, at the time of drafting article 6, a formulation requiring a claim by the injured State. He had set it aside in view of the implications which such a formulation might have on the problem of acquiescence. Would not the adoption of Mr. Graefrath's proposal imply that the silence of the injured State be too easily interpreted as acquiescence? He noted that he could accept the other suggestion which had been made, particularly by Mr. Razafindralambo (2102nd meeting, para. 60), concerning the concept of wrongful acts "extending in time".

60. Referring finally to restitution in kind, he explained that, unlike Mr. Graefrath, Mr. Barboza and Mr. Shi, but like Mr. Calero Rodrigues, Mr. Al-Qaysi, Mr. Hayes, Mr. McCaffrey and Mr. Solari Tudela, he was in favour of the broad interpretation of the concept of restitution. In that connection, draft article 8—to be submitted in his forthcoming second report—made it abundantly clear that reparation was to be understood in the broadest sense, namely in the sense that it should result in the re-establishment of the situation which would have existed if the wrongful act had not been committed. He hoped that misgivings about the various limitations on the obligation of restitution in kind which were provided for in paragraphs 1 and 2 of the new draft article 7 would be dispelled, at least in part, by the subsequent draft articles, and in particular the article on pecuniary compensation. It would then be seen that a State which released itself from its obligation of restitution in kind by invoking one of the reasons set out in article 7, paragraphs 1 and 2, was still bound to repair the damage by means of pecuniary compensation.

61. In reply to Mr. Al-Baharna's suggestion (2122nd meeting) that the Latin expression *restitutio in integrum* should be used in article 7, he explained that that could cause confusion, particularly since that expression did not have exactly the same meaning in Roman law, in civil law and in the common law. In reply to a comment by Mr. Tomuschat, he indicated that the question of damages, as well as interest, would be dealt with in his second report.

62. As to the question of nullity raised by Mr. Al-Khasawneh in connection with paragraph 3 of draft article 7, he said that he failed to see how an international court could directly declare null and void an internal legislative provision or the judgment of a national court. An international court could only declare the international unlawfulness of the presence or the effects—according to the case—of a piece of national law and address an injunction to the State. It would be for the latter to repeal the provision or reverse the judgment which stood in the way of restitution or other forms of reparation.

63. In conclusion and in reply to a question by the CHAIRMAN, he said that he was in favour of referring the new draft articles 6 and 7 to the Drafting Committee.

64. Mr. EIRIKSSON said that he had no objection to referring the articles to the Drafting Committee, but asked what the Committee was expected to do with them.

65. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 6 and 7 as submitted by the Special Rapporteur to the Drafting Committee.

It was so agreed.

The meeting rose at 6.10 p.m.

2128th MEETING

Thursday, 29 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Co-operation with other bodies

[Agenda item 10]

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

1. The CHAIRMAN invited Mr. Njenga, in his capacity as Observer for the Asian-African Legal Consultative Committee, to address the Commission.

2. Mr. NJENGA (Observer for the Asian-African Legal Consultative Committee) said that the Asian-African Legal Consultative Committee greatly valued its traditional links with the Commission, which dated back to the 1960s. As its Secretary-General for the past two years, he was convinced of the commitment of all its members to the strengthening of the ties between the two bodies.

3. The Committee had had the honour of welcoming the previous Chairman of the Commission, Mr. Díaz González, to its twenty-eighth session, held at Nairobi earlier in the year, and had much appreciated the informative statement he had made. Past sessions of the Committee had been attended by a number of distinguished members and former members of the Commission, in accordance with the provision of the Committee's statute requiring it to consider at its sessions the work done in the Commission. Two of those former members, Mr. Elias and the late Nagendra Singh, had at one point themselves been President of the Committee.

4. The Committee greatly appreciated the Commission's role in the progressive development and codification of international law and commended it on its meticulous work on matters of vital importance to the international community. Three items on the Commission's agenda were of particular interest to Governments in the Asian-African region: international liability for injurious consequences arising out of acts not prohibited by international law; jurisdictional immunities of States and their property; and the law of the non-navigational uses of international watercourses. The second and third items, which had been on the Committee's agenda for a long time, were also in its current work programme. Jurisdictional immunities of States had, moreover, been the theme at two meetings of the legal advisers of member Governments of the Committee held in 1984 and 1987. The Committee's interest in the subject, which dated back to the late 1950s, had of course been heightened by the fact that the Commission had begun the second reading of its draft articles on the topic.

5. The item "Law of international rivers" had first been included in the Committee's agenda in 1967 and had since been considered at a number of its sessions. The keen interest of member States in the subject was readily understandable, since many of the world's great rivers, such as the Nile, the Niger, the Indus, the Tigris and the Euphrates, flowed through their territories. At the session held at Arusha in 1985, however, it had been decided to defer further consideration of the item until the Commission had made sufficient progress on the topic. The Committee now considered that, under the able guidance of the Special Rapporteur, Mr. McCaffrey, the Commission had achieved great progress and it therefore hoped to include the item in its own agenda again.

6. Many members of the Committee regarded the transboundary movement and dumping of hazardous and toxic wastes as a vitally important aspect of liability for acts not prohibited by international law. Such concern had been the subject of the recent conference which had adopted the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. It was hoped that the legal advisers of member Governments of the Committee would review that Convention so as to help member States in the region on that issue of great concern.

7. At its twenty-eighth session, the Committee had decided to propose that a seminar on the above-mentioned three topics be organized in co-operation with the Commission during the forty-fourth session of the General Assembly in New York. Such a seminar would be of considerable benefit to both bodies in their future work on those topics. The United Nations Secretariat had agreed to provide facilities for the seminar to be held from 9 to 13 October 1989. He also hoped that the Commission would agree to request the special rapporteurs for the topics in question to represent it at the seminar and that as many members of the Commission as possible would take part in it.

8. Commenting on the Committee's current work programme, he recalled that a study prepared by the Committee in 1985 on promoting wider use by States of the ICJ had been circulated to the General Assembly at its fortieth session.[1] Following the favourable response to that study, a colloquium had been organized in co-operation with the ICJ in 1986 and a follow-up study was to be prepared for consideration at the Committee's next session.

9. Under the programme of co-operation between the United Nations and the Asian-African Legal Consultative Committee, the Committee would again prepare brief notes on the legal aspects of some selected items to be considered by the Sixth Committee at the forty-fourth session of the General Assembly. They would include notes on the Commission's work at the current session, as well as on other items related to the Committee's general work programme.

10. The Committee, which had always attached great importance to the law of the sea, had decided at its twenty-eighth session to reactivate its Sub-Committee on the Law of the Sea and had directed its secretariat to prepare a brief on joint ventures between the mining arm of the International Sea-Bed Authority—the Enterprise—and corporate entities, particularly from developing countries.

11. Other items in the Committee's work programme included the preparation of studies on the dumping of toxic wastes off the coasts of developing countries; the status and treatment of refugees; the deportation of Palestinians in violation of international law; the criteria for distinguishing between international terrorism and national liberation movements; the extradition of fugitive offenders; the debt burden of developing countries; the concept of a "peace zone" in international law; the Indian Ocean as a zone of peace; the legal framework for industrial joint ventures; the elements of a legal instrument of good neighbourly relations among countries of the Asian-African and Pacific regions; international trade law matters; and a feasibility study on the establishment of a centre for research and development of legal régimes applicable to economic activities in developing countries in Asia and Africa.

12. Lastly, he extended an invitation, on behalf of the Committee, to the Chairman of the Commission to represent the Commission at the twenty-ninth session of the Committee, to be held at Beijing in April 1990.

13. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his statement and for his kind invitation to represent the Commission at the Committee's twenty-ninth session. The results of the Committee's discussions on topics such as the jurisdictional immunities of States and international watercourses would undoubtedly contribute to the Commission's work. The proposed seminar in New York had the Commission's full support and he was certain that the special rapporteurs concerned would be happy to take part in it.

[1] See A/40/682.

14. Mr. DÍAZ GONZÁLEZ thanked the Asian-African Legal Consultative Committee, through its Observer, for the warm welcome he had received as the representative of the Commission at the Committee's twenty-eighth session. There was no need for him to dwell on the importance of close co-operation between the Committee and the Commission in further work on the codification of international law.

15. Mr. SHI expressed appreciation to the Observer for the Asian-African Legal Consultative Committee for his very informative statement on the work of the Committee, which was an important organization for consultation among Asian and African States on legal subjects of common interest. Having had the opportunity to attend two of its sessions in the past, he knew from experience that the co-operation between the Commission and the Committee was of mutual benefit. He trusted that that co-operation would increase in the future. He was sure that the people of Beijing would give the Committee a warm welcome when it held its next session there in 1990.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/409 and Add.1-5,[2] A/CN.4/417,[3] A/CN.4/420,[4] A/CN.4/L.431, sect. E, A/CN.4/L.432, ILC(XLI)/Conf.Room Doc.1)

[Agenda item 4]

Draft articles proposed by the Drafting Committee on second reading[5]

Articles 1 to 32 and draft Optional Protocols One and Two

16. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft articles 1 to 32 as adopted by the Committee on second reading, as well as draft Optional Protocols One and Two (A/CN.4/L.432).

17. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) expressed appreciation to the members of the Drafting Committee for their co-operation and hard work and to those other members of the Commission who had played an active part in the Committee's discussions. A special tribute was due to the Special Rapporteur for his untiring dedication and constructive spirit. He also thanked the secretariat, and in particular Jacqueline Dauchy, Mahnoush Arsanjani and Manuel Rama-Montaldo, who were a fine example of a secretariat team at its best.

18. At the stage of second reading, the Drafting Committee had been at pains to introduce as few changes as possible in the texts provisionally adopted by the Commission on first reading, while giving due weight to the views expressed by Governments and to the proposals for amendment made by the Special Rapporteur on the basis of those views.

19. In addition to articles 1 to 32, the Drafting Committee's report (A/CN.4/L.432) contained two draft optional protocols dealing, respectively, with the status of the courier and the bag of special missions and the status of the courier and the bag of international organizations of a universal character. He suggested that the Commission consider the articles one by one.

Article 1 (Scope of the present articles)

20. The text proposed by the Drafting Committee for article 1 read:

Part I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

21. The Drafting Committee recommended no change in article 1 as adopted on first reading. Paradoxical though it might sound, that did not mean that the scope of the articles themselves remained unchanged.

22. Article 1 provided that the articles would apply to the diplomatic courier and diplomatic bag employed for the official communications of a "State" with its "missions, consular posts" and "delegations" and for the official communications of those missions, consular posts and delegations with the State or with each other. The scope of the articles, as thus defined in general terms, was clarified by article 3 (Use of terms), which, as adopted on first reading, included within the scope of the draft the diplomatic courier and the diplomatic bag within the meaning of the 1961 Vienna Convention on Diplomatic Relations; the consular courier and the consular bag within the meaning of the 1963 Vienna Convention on Consular Relations; the courier and the bag of a special mission within the meaning of the 1969 Convention on Special Missions; and the courier and the bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation within the meaning of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.[6] That scope was, however, far from being general, because article 33 provided for an optional declaration whereby any State could, when expressing its consent to be bound by the articles or at any time thereafter, make a declaration limiting the scope of the articles, so far as it was concerned, by indicating that it would not apply the articles to a given category of courier and bag. Thus, while the scope was wide, each State had the possibility of reducing it by means of a declaration.

23. The optional declaration was designed to meet the view of a number of Governments and members of the Commission that the scope was too wide. They considered that, since some of the four Conventions referred to in article 3 had received only a limited number of ratifications

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[3] *Ibid.*

[4] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[5] The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook . . . 1986*, vol. II (Part Two), pp. 24 *et seq.* For the commentaries, *ibid.*, p. 24, footnote 72.

[6] These four conventions are referred to as the "codification conventions". The 1975 Convention is hereinafter referred to as "1975 Vienna Convention on the Representation of States".

or acceptances, States which were not parties to those Conventions and which objected to them might decide not to become parties to the present articles. On the other hand, it had been pointed out that article 33 defeated one of the main purposes of the articles, namely the establishment of a uniform régime for all couriers and bags. In his eighth report (A/CN.4/417, para. 277), the Special Rapporteur had suggested that article 33 be deleted in view of the insignificant support for it, and the substantial reservations and objections to it.

24. The Drafting Committee had decided to recommend the deletion of article 33, as the Special Rapporteur had suggested. It had also decided to recommend that the scope of the articles be reduced by excluding the courier and bag of special missions within the meaning of the 1969 Convention on Special Missions. States wishing to apply the articles to such couriers and bags could do so by becoming parties to an optional protocol, on which he would comment later. The reduction in scope did not call for any change in article 1, but resulted from the deletion of the references to special missions and their couriers and bags in article 3, paragraph 1 (1) (*c*), (2) (*c*) and (6) (*b*).

25. Mr. YANKOV (Special Rapporteur) thanked the Chairman of the Drafting Committee for his kind words and expressed appreciation to the secretariat for its assistance.

26. He agreed with the general interpretation which the Chairman of the Drafting Committee had given concerning the scope of the articles and expressed the hope that the two optional protocols would enhance the prospects for reaching broad agreement.

27. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 1.

Article 1 was adopted.

ARTICLE 2 (Couriers and bags not within the scope of the present articles)

28. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 2, which read:

Article 2. Couriers and bags not within the scope of the present articles

The fact that the present articles do not apply to couriers and bags employed for the official communications of special missions or international organizations shall not affect:

(*a*) the legal status of such couriers and bags;

(*b*) the application to such couriers and bags of any rules set forth in the present articles which would be applicable under international law independently of the present articles.

29. Article 2 was designed to incorporate a reference, in the main instrument being drafted by the Commission, to couriers and bags employed for the official communications of special missions and international organizations, since it had been decided that such entities would be dealt with in detail and separately in the optional protocols.

30. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 2.

Article 2 was adopted.

31. Mr. AL-BAHARNA said that, although he had not opposed the adoption of article 2, he did not think that there was any need for a reminder, either to States that would sign the optional protocols or to those that would not, that there were provisions of international law applicable to the couriers and bags of special missions and international organizations.

32. Mr. YANKOV (Special Rapporteur) said that article 2 was a useful safeguard provision which would provide protection in situations outside the framework of the two protocols, for example for the communications of national liberation movements.

ARTICLE 3 (Use of terms)

33. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 3, which read:

Article 3. Use of terms

1. For the purposes of the present articles:

(1) "diplomatic courier" means a person duly authorized by the sending State, either on a regular basis or for a special occasion as a courier *ad hoc*, as:

(*a*) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(*b*) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963; or

(*c*) a courier of a permanent mission, a permanent observer mission, a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975; who is entrusted with the custody, transportation and delivery of the diplomatic bag and is employed for the official communications referred to in article 1;

(2) "diplomatic bag" means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communications referred to in article 1 and which bear visible external marks of their character as:

(*a*) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(*b*) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963; or

(*c*) a bag of a permanent mission, a permanent observer mission, a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(3) "sending State" means a State dispatching a diplomatic bag to or from its missions, consular posts or delegations;

(4) "receiving State" means a State having on its territory missions, consular posts or delegations of the sending State which receive or dispatch a diplomatic bag;

(5) "transit State" means a State through whose territory a diplomatic courier or a diplomatic bag passes in transit;

(6) "mission" means:

(*a*) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961; and

(*b*) a permanent mission or a permanent observer mission within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(7) "consular post" means a consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(8) "delegation" means a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(9) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

34. Since the courier and bag of special missions were to be excluded from the scope of the articles and dealt with in an optional protocol, all the provisions of article 3 which had referred to such couriers and bags and to special missions themselves had been deleted.

35. Mr. YANKOV (Special Rapporteur), commenting on paragraph 1 (1) (*c*) and (6) (*b*), said that, during the Drafting Committee's work, it had become clear that the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies were highly relevant to the subject of official communications of States with their permanent and other missions and with delegations to international organizations and international conferences. Since their adoption, those Conventions had constituted the legal basis for such communications, including those carried on using couriers and bags, and they had gained universal recognition by Members and non-members of the United Nations and of specialized agencies. Although they did not contain special provisions on definitions or the use of terms, such definitions could easily be inferred. By way of example, he read out sections 11 and 16 of article IV of the Convention on the Privileges and Immunities of the United Nations, which were most explicit about the sense in which the term "representatives" was to be used.

36. He could accept the omission of references to the 1946 and 1947 Conventions on the grounds that they did not define the concepts of a permanent mission, a delegation or a courier, but, in order to avoid any possible criticism that the Commission had cited only a convention which had not yet entered into force, namely the 1975 Vienna Convention on the Representation of States, he would insist that the statement he had just made be fully reflected in the commentary.

37. Mr. TOMUSCHAT said that the reference in article 3, paragraph 1 (2), to packages "which bear visible external marks of their character" was unnecessary, might be confusing and should be deleted. The phrase seemed to imply that such external marks were a constituent, integral element of the diplomatic bag and that, if they were obliterated by accident or through a criminal act, the bag would no longer have diplomatic status.

38. Mr. MAHIOU, referring to the Drafting Committee's decision to delete the provisions of article 3 dealing with special missions, said he trusted that the commentary would explain the reasons for their deletion.

39. Mr. McCAFFREY said that he had no difficulty with the position adopted by the Special Rapporteur, but reserved the right to react to the specific points that would be made in the commentary when the text was available.

40. The comment made by Mr. Tomuschat was a valid one, although it was also true that something must indicate—to customs officials, for example—that a certain package was a diplomatic bag. Instead of deleting the reference to "visible external marks", it might be preferable to indicate in the commentary that such marks were not a determining factor in the status of the diplomatic bag.

41. Since the numbering of the subparagraphs of article 3 was rather awkward, it might be better to adopt the system of identification used in article 41 of the 1969 Vienna Convention on the Law of Treaties, referring to paragraph 1 (*b*) (ii), for example, instead of to paragraph 1 (2) (*b*).

42. Mr. BENNOUNA said that he was responsive to the comments made by the Special Rapporteur and thought that there was no reason why a reference to the 1946 and 1947 Conventions should not be incorporated in the draft articles. He agreed with Mr. Tomuschat that the phrase "and which bear visible external marks of their character", in paragraph 1 (2) of article 3, gave the impression that showing such marks was an absolute prerequisite if a bag was to have diplomatic status. It might therefore be appropriate to replace that phrase by the words "and which normally bear visible external marks of their character".

43. Mr. DÍAZ GONZÁLEZ said that he would not support any change in the reference to "visible external marks", which were indicative of the fact that a given package was a diplomatic bag.

44. Mr. EIRIKSSON said he endorsed Mr. McCaffrey's suggestion that the subparagraphs of article 3 be renumbered in accordance with the method used in article 41 of the Vienna Convention on the Law of Treaties.

45. Mr. YANKOV (Special Rapporteur), referring to Mr. Tomuschat's comment on the reference to "visible external marks", said he believed that that reference was necessary: otherwise, there would be no way of determining which of a number of packages was a diplomatic bag. It might be worth while, however, to explain in the commentary that if, as a result of exceptional circumstances, the external marks of a diplomatic bag had been destroyed, it should still be considered to be a diplomatic bag if the sending State could provide evidence that it was used for official communications. The purpose of the reference was not only the identification of a package as a diplomatic bag, but the specification of the main constituent features of a diplomatic bag, one of which was visible external marks. The phrase had been taken from article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

46. With regard to the suggestion made by Mr. McCaffrey, and supported by Mr. Eiriksson, for the renumbering of the subparagraphs of article 3, he noted that the 1969 Vienna Convention on the Law of Treaties was only one possible model and that different techniques had been used in instruments adopted later. He would, however, have no objection to the proposed renumbering.

47. In reply to Mr. Bennouna's comment on the inclusion in the draft of a specific reference to the 1946 and 1947 Conventions, he said he believed that that point could be made in the commentary, although he would have no objection to the incorporation of such a reference if the Commission so wished. He did not think that Mr. Bennouna's proposal that the word "normally" be added before the word "bear" was an improvement on the text of paragraph 1 (2).

48. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that one of the main reasons for not including in the draft articles references to the 1946 and 1947 Conventions was that they mentioned diplomatic bags

only in passing. The Drafting Committee had concluded that a note in the commentary about the point raised by the Special Rapporteur would be the best solution.

49. With regard to Mr. Tomuschat's proposal for the deletion of the reference in paragraph 1 (2) to "visible external marks", he said that the purpose in article 3 was not to state that the diplomatic bag should have external marks: that was done in article 24. The object of the reference was to draw a distinction between the diplomatic bags of permanent missions or delegations and those of special missions, which would be covered in the proposed optional protocol.

50. Mr. McCaffrey's proposal for the renumbering of the subparagraphs of article 3 had already been discussed in the Drafting Committee and had been rejected.

51. Mr. HAYES said that the words "and which bear visible external marks of their character" in paragraph 1 (2) gave the impression that visible external marks were an essential element of the bag.

52. The basic provision in the matter was article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, which stated that the packages constituting the diplomatic bag "must bear visible external marks of their character" and "may contain only diplomatic documents or articles intended for official use". Those two conditions were stated clearly in article 24 (Identification of the diplomatic bag) and article 25 (Contents of the diplomatic bag) of the present draft.

53. He believed he was right in saying that article 27, paragraph 4, of the 1961 Vienna Convention was not a definition and that its purpose was to set forth the obligations of the sending State. Article 3 now under discussion was, however, a definitional article on the use of terms for the purposes of the present articles. The obligation with respect to marking was not part of the definition of the diplomatic bag. In fact, even if the marking were omitted, the diplomatic bag would still be a diplomatic bag. For those reasons, he supported Mr. Tomuschat's proposal for the deletion of the words "and which bear visible external marks of their character" in paragraph 1 (2).

54. Mr. KOROMA said that the Special Rapporteur and the Chairman of the Drafting Committee had fully replied to Mr. Tomuschat's point. There were valid practical reasons for retaining the wording on visible external marks. The whole purpose of the rules embodied in the draft articles was to protect the diplomatic bag. In general, when a diplomatic bag arrived at an airport, it would be put in the same place as other bags. Unless it had visible external marks, there would be no way of distinguishing it from the others. It was therefore appropriate to retain the marking requirement in paragraph 1 (2), whose wording was not mandatory but, rather, flexible enough to place both the receiving State and the sending State on notice that it would be helpful for the bag to bear visible external marks of its character.

55. He suggested that, in order to bring the text of paragraph 1 (2) into line with the wording of article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, the words " 'diplomatic bag' means" should be replaced by "a 'diplomatic bag' shall consist of" and the word "exclusively" should be deleted.

56. Mr. YANKOV (Special Rapporteur) said that Mr. Hayes was right to point out that article 3, which began with the words "For the purposes of the present articles", was a definitional provision. However, he could not agree to the proposal for the deletion of the reference to visible external marks in paragraph 1 (2). One reason was that the word "as" linked the marking requirement to subparagraphs (*a*), (*b*) and (*c*), beginning with the words "a diplomatic bag", "a consular bag" and "a bag of a permanent mission, a permanent observer mission, a delegation or an observer delegation", respectively. In addition, marks enabled the receiving State and the transit State to determine the category of the bag. There were differences between the privileges pertaining to each category and the receiving State or the transit State had to be in a position to know whether to treat the bag as a diplomatic bag, a consular bag or the bag of a mission.

57. With regard to the proposals made by Mr. Koroma (para. 55 above), he said that, since the word "exclusively" had been adopted by the Commission to qualify the concept of "articles intended for official use" for the purpose of preventing cases of abuse by strengthening the requirements in the matter, he did not think that it should be deleted. He also did not think that the word "means" should be replaced by the words "shall consist of". The word "means" was part of the standard language of the traditional article on the use of terms contained in United Nations conventions.

58. Mr. FRANCIS said that he was in favour of retaining the words "and which bear visible external marks of their character" in paragraph 1 (2). They were an essential element, especially since the bag would be handled mainly by laymen: the existence of visible external marks would put them on their guard. Moreover, those words were inextricably linked by the word "as" to subparagraphs (*a*), (*b*) and (*c*).

59. Mr. AL-BAHARNA said that the requirement of visible external marks should be retained. As it now stood, the requirement was merely a recommendation: any failure to observe it would not involve a penalty. It should not be strengthened or be made compulsory. Accordingly, any problems that might arise could be settled amicably by the States concerned.

60. He did not agree with Mr. Koroma's proposal for the deletion in paragraph 1 (2) of the word "exclusively", which qualified "articles intended for official use". The word "only" might, however, be added before the words "official correspondence", in order to bring the definition into line with article 25, paragraph 1.

61. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 3 as proposed by the Drafting Committee.

Article 3 was adopted.

ARTICLE 4 (Freedom of official communications)

62. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 4, which read:

Article 4. Freedom of official communications

1. The receiving State shall permit and protect the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, as referred to in article 1.

2. The transit State shall accord to the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, the same freedom and protection as is accorded by the receiving State.

63. No change had been proposed to the wording of article 4 and the Drafting Committee recommended that it be retained as it stood.

64. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 4.

Article 4 was adopted.

ARTICLE 5 (Duty to respect the laws and regulations of the receiving State and the transit State)

65. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 5, which read:

Article 5. Duty to respect the laws and regulations of the receiving State and the transit State

1. The sending State shall ensure that the privileges and immunities accorded to its diplomatic courier and diplomatic bag are not used in a manner incompatible with the object and purpose of the present articles.

2. Without prejudice to the privileges and immunities accorded to him, it is the duty of the diplomatic courier to respect the laws and regulations of the receiving State and the transit State.

66. The Drafting Committee had agreed that the words "as the case may be" were unnecessary, since they added nothing to the understanding of the text, and recommended that they be deleted in paragraph 2 of article 5, as well as in 15 other places in the draft articles adopted on first reading.

67. The Drafting Committee also recommended the deletion of the second sentence of paragraph 2 as adopted on first reading, which read: "He also has the duty not to interfere in the internal affairs of the receiving State or the transit State, as the case may be." Some Governments had considered that sentence to be superfluous and, in his eighth report (A/CN.4/417, para. 82), the Special Rapporteur had taken the view that, in the interests of simplicity and brevity, it could be deleted. His own understanding, which was also that of the Drafting Committee, was that the duty of the courier to respect the laws and regulations of the receiving State and the transit State entailed the obligation not to interfere in the internal affairs of those States.

68. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 5.

Article 5 was adopted.

ARTICLE 6 (Non-discrimination and reciprocity)

69. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 6, which read:

Article 6. Non-discrimination and reciprocity

1. In the application of the provisions of the present articles, the receiving State or the transit State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(*a*) where the receiving State or the transit State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic courier or diplomatic bag by the sending State;

(*b*) where States by custom or agreement extend to each other more favourable treatment with respect to their diplomatic couriers and diplomatic bags than is required by the present articles.

70. The Drafting Committee recommended that paragraph 2 (*b*) as adopted on first reading should be simplified. It had provided that, if the extension of treatment more favourable than that required by the present articles was not to be regarded as discrimination, the modification must not be incompatible with the object and purpose of the articles and must not affect the enjoyment of the rights or the performance of the obligations of third States. In his eighth report (A/CN.4/417, para. 92), the Special Rapporteur had already suggested the deletion of the second condition. The Drafting Committee was now recommending the deletion of the first as well. The Committee had considered that the extension by States of more favourable treatment to their couriers and bags, whether by custom or by agreement, could in no way be incompatible with the object and purpose of the articles and could not affect the enjoyment of the rights or the performance of the obligations of other States.

71. Mr. AL-KHASAWNEH said that he had no objection to the changes proposed by the Drafting Committee. He suggested that the commentary should draw attention to the element of proportionality or symmetry in the operation of the reciprocity referred to in paragraph 2 (*b*).

72. Mr. BENNOUNA said that paragraph 1 referred to "the application of the provisions of the present articles", while paragraph 2 (*a*) referred to "a restrictive application" of a provision of "the present articles". The wording of paragraph 2 (*a*) should therefore be amended to make it clear that reference was being made to articles other than article 6 itself.

73. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the suggestions made by Mr. Al-Khasawneh and Mr. Bennouna could be dealt with by means of an explanation in the commentary.

74. Mr. YANKOV (Special Rapporteur), replying to a question by Mr. REUTER concerning the meaning of the words *par coutume* in the French text of paragraph 2 (*b*), said that the important role of customary law in the field of diplomatic and consular law was well known. Paragraph 2 (*b*) was modelled on article 47, paragraph 2 (*b*), of the 1961 Vienna Convention on Diplomatic Relations and article 72, paragraph 2 (*b*), of the 1963 Vienna Convention on Consular Relations. In the English text, the words "by custom" were used to indicate that the more favourable treatment in question was not necessarily extended on the basis of a written agreement.

75. Mr. REUTER said that the commentary to article 6 should indicate whether the words "by custom" referred to a rule of customary law or to practice as a matter of *comitas gentium*. He suggested that, in the French text of paragraph 2 (*b*), the words *par coutume ou par voie d'accord* should be replaced by *par voie de coutume ou d'accord*.

76. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that that drafting amendment to the French text was acceptable. As to the meaning of the words

"by custom", he believed that the explanations the Special Rapporteur would provide in the commentary would be sufficient.

77. Mr. ILLUECA proposed that the Spanish text be amended along the same lines as suggested for the French.

78. Mr. BENNOUNA said that the words "by custom" covered both customary rules and ordinary practice; their use could thus be said to constitute a case of constructive ambiguity.

79. Mr. YANKOV (Special Rapporteur) said that he agreed with that interpretation and would try to bring the point out in the commentary.

80. Mr. BEESLEY said that it would be preferable not to allow any ambiguity. He wondered whether wording such as "reciprocal" or "mutual" "practice" or "custom" could not be used.

81. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the discussion had made it clear that the words "by custom or agreement" in paragraph 2 (*b*) were intended to cover all possibilities. An explanation would be provided in the commentary. He recommended that article 6 be adopted without change in English and with the drafting change proposed in French.

82. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 6 as proposed by the Drafting Committee, with the amendment to the French text proposed by Mr. Reuter (para. 75 above).

It was so agreed.

Article 6 was adopted.

ARTICLE 7 (Appointment of the diplomatic courier)

83. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 7, which read:

PART II

STATUS OF THE DIPLOMATIC COURIER AND THE CAPTAIN OF A SHIP OR AIRCRAFT ENTRUSTED WITH THE DIPLOMATIC BAG

Article 7. Appointment of the diplomatic courier

Subject to the provisions of articles 9 and 12, the sending State or its missions, consular posts or delegations may freely appoint the diplomatic courier.

84. Purely drafting changes were suggested for article 7, whose wording was now closer to that of similar articles in other instruments, such as article 7 of the 1961 Vienna Convention on Diplomatic Relations. There had been no change in the meaning of the article.

85. Mr. McCAFFREY suggested that the positions of part II (Status of the diplomatic courier and the captain of a ship or aircraft entrusted with the diplomatic bag) and part III (Status of the diplomatic bag) of the draft should be reversed in order to shift the emphasis from the diplomatic courier to the diplomatic bag.

86. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the present sequence had been adopted at the very beginning because it reflected the title of the topic. He recommended that no change be made in the order of the parts of the draft.

87. Mr. KOROMA said that he had no difficulty with the substance of article 7, but would prefer it to be drafted in the passive voice and to read: "Subject to the provisions of articles 9 and 12, the diplomatic courier may be appointed by the sending State or by its missions, consular posts or delegations." That change would, of course, require the deletion of the word "freely".

88. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the matter had been discussed in the Drafting Committee and that the proposed text had been decided on in view of the essential nature of the word "freely".

89. Mr. BARSEGOV said that the expression *de leur choix* in the French text, although not identical with the word "freely", was entirely satisfactory. The same was true of the Russian text.

90. Mr. YANKOV (Special Rapporteur) recalled that the matter had been discussed on first reading; an explanation was to be found in the commentary.

91. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 7 as proposed by the Drafting Committee.

Article 7 was adopted.

ARTICLE 8 (Documentation of the diplomatic courier)

92. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 8, which read:

Article 8. Documentation of the diplomatic courier

The diplomatic courier shall be provided with an official document indicating his status and essential personal data, including his name, official position or rank, as well as the number of packages constituting the diplomatic bag which is accompanied by him and their identification and destination.

93. Article 8 as adopted on first reading had required the official document carried by the diplomatic courier to indicate his status and the number of packages constituting the diplomatic bag accompanied by him. The Drafting Committee had accepted suggestions that more complete information should be included in the document concerning both the courier and the bag. In the case of the courier, the document should not only indicate his status, but also contain essential personal data, such as his name and official position or rank. As to the bag, the document should not only indicate the number of packages constituting it, but also contain elements of identification of the packages, as well as an indication of their destination.

94. Mr. KOROMA suggested that, since, in many cases, the diplomatic courier had no official position or rank, the words "and, where necessary" should be added between the words "his name" and "official position or rank".

95. Mr. YANKOV (Special Rapporteur) said that such an addition would be redundant: it was sheer common sense that no official position or rank had to be indicated where none was held. However, if Mr. Koroma insisted on the amendment, he would prefer the words "and, where appropriate".

96. Mr. KOROMA said that the Special Rapporteur's explanation had confirmed his belief that the proposed addition was necessary. It was never advisable to rely on common sense.

97. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he agreed with the Special Rapporteur, but would have no objection to the addition of the words "and, where appropriate" if the members of the Drafting Committee so agreed.

98. Mr. HAYES suggested that the words "where appropriate" be added after the word "rank".

99. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 8, with the addition of the words "and, where appropriate" between the words "his name" and "official position or rank".

It was so agreed.

Article 8 was adopted.

ARTICLE 9 (Nationality of the diplomatic courier)

100. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 9, which read:

Article 9. Nationality of the diplomatic courier

1. The diplomatic courier should, in principle, be of the nationality of the sending State.

2. The diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of that State, which may be withdrawn at any time. However, when the diplomatic courier is performing his functions in the territory of the receiving State, the withdrawal of consent shall not take effect until the diplomatic courier has delivered the diplomatic bag to its consignee.

3. The receiving State may reserve the right provided for in paragraph 2 also with regard to:

(*a*) nationals of the sending State who are permanent residents of the receiving State;

(*b*) nationals of a third State who are not also nationals of the sending State.

101. No changes were proposed in the substance of article 9. However, a second sentence—which the Special Rapporteur had proposed in his eighth report (A/CN.4/417, para. 111)—was recommended for paragraph 2. The receiving State had to give its consent for a person having its nationality to be appointed as a diplomatic courier by a sending State. That consent could be withdrawn at any time. As the Special Rapporteur had explained, such withdrawal of consent should not interfere with the normal functioning of official communications and should not prejudice the protection of a diplomatic bag already on its way or its safe delivery to the consignee. The new sentence proposed by the Drafting Committee thus read: "However, when the diplomatic courier is performing his functions in the territory of the receiving State, the withdrawal of consent shall not take effect until the diplomatic courier has delivered the diplomatic bag to its consignee."

102. For stylistic purposes, the word "also" had been included in the introductory clause of paragraph 3 and, in the French text of paragraph 2, the words *en tout temps* had been replaced by *à tout moment* as a translation of the words "at any time".

103. Mr. EIRIKSSON suggested that the first sentence of paragraph 2 should end with the words "consent of that State" and that it be followed by a second sentence reading: "Such consent may be withdrawn at any time; however, when the diplomatic courier . . . ". That change would make the meaning of the paragraph much clearer.

104. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he saw little substantial difference between the text adopted by the Drafting Committee and that proposed by Mr. Eiriksson. As Chairman of the Drafting Committee, he was bound to recommend the former text.

105. Mr. HAYES suggested that a compromise solution would be to delete the word "However".

106. Mr. YANKOV (Special Rapporteur) said that, since the word "However" came immediately after the statement that the consent of the receiving State could be withdrawn at any time, it was an essential introduction to the proviso which followed.

107. Mr. AL-BAHARNA asked why the word "should" was used in paragraph 1 rather than the word "shall".

108. Mr. YANKOV (Special Rapporteur) said that the use of the word "should" in conjunction with the words "in principle" was intended to allow for the practice adopted by many States of employing one courier for missions to more than one country. He recalled that paragraph 1 had been adopted in its present form on first reading.

109. Mr. MAHIOU said that the French text of paragraph 1 as adopted on first reading stated: *Le courrier diplomatique aura en principe* . . . . In the text proposed by the Drafting Committee, the word *aura* had been replaced by the word *a*. He wondered whether that change had any significance.

110. Mr. ILLUECA, supported by Mr. DÍAZ GONZÁLEZ, stressed the importance of bringing all the language versions into line with one another.

111. Mr. McCAFFREY said that the word "should" in paragraph 1 should be replaced by "shall". The optional nature of the paragraph was already implied by the words "in principle".

112. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he was prepared to accept that amendment, since the words "shall, in principle" were also used in article 17, paragraph 1.

113. Mr. YANKOV (Special Rapporteur) said that paragraph 1 of article 9 was modelled on article 8, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations and on article 22, paragraph 1, of the 1963 Vienna Convention on Consular Relations. However, he was inclined to agree with Mr. McCaffrey that the word "should", followed by the words "in principle", placed too much emphasis on the optional nature of the provision. He would therefore not object if it were replaced by the word "shall".

The meeting rose at 1.05 p.m.

2129th MEETING

Friday, 30 June 1989, at 10.05 a.m.

Chairman: Mr. Emmanuel J. ROUCOUNAS

later: Mr. Bernhard GRAEFRATH

later: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/409 and Add.1-5,[1] A/CN.4/417,[2] A/CN.4/420,[3] A/CN.4/L.431, sect. E, A/CN.4/L.432, ILC(XLI)/Conf.Room Doc.1)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING[4] (*continued*)

ARTICLE 9 (Nationality of the diplomatic courier)[5] (*concluded*)

1. The CHAIRMAN reminded members that the Commission still had to decide whether the word "should" in paragraph 1 should be replaced by "shall".

2. Mr. YANKOV (Special Rapporteur) said that paragraph 1 was modelled on article 8, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, as well as on article 22 of the 1963 Vienna Convention on Consular Relations, article 10 of the 1969 Convention on Special Missions and article 73 of the 1975 Vienna Convention on the Representation of States. In those Conventions, the word "should" was used and there were no commas around the words "in principle". In his view, there were no serious reasons why the Commission should depart from that established formula.

3. With regard to paragraph 2, it had been decided, following consultations with the Chairman of the Drafting Committee, to propose replacing the definite article "the", at the beginning of the second sentence, by the indefinite article "a" and the words "until the diplomatic courier", in the same sentence, by "until he"; it was also proposed to delete the word "the" before the word "withdrawal".

4. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he had no definite views about the choice between "should" and "shall".

5. Mr. KOROMA said that he supported the text of paragraph 1 proposed by the Drafting Committee, as orally amended by the Special Rapporteur, namely with the deletion of the two commas. The word "shall" would be too mandatory. It was also necessary to harmonize all the draft articles on that point so as to avoid any future problems of interpretation.

6. Mr. RAZAFINDRALAMBO said that, in his view, the wording used in the four codification conventions should be retained, but the word "should" should be rendered in French by the word *aura*, not the word *a*.

7. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the word *aura*, which appeared in the text adopted on first reading, had been replaced by the word *a* on second reading at the suggestion of the translation services.

8. Mr. REUTER said that it was possible to use either word.

9. The CHAIRMAN said that, since the word *aura* appeared in the four codification conventions, it would be appropriate to retain it. If there were no objections, he would take it that the Commission agreed to delete the commas in paragraph 1 of article 9 and to replace the word *a* in the French text by the word *aura*.

It was so agreed.

10. Mr. REUTER said that he had some doubts about the Special Rapporteur's proposal to replace the word "the" by the word "a" at the beginning of the second sentence of paragraph 2, since the reference was to a particular diplomatic courier, namely a courier who had the nationality of the receiving State and who had been appointed with the consent of that State.

11. Mr. YANKOV (Special Rapporteur) said that Mr. Reuter's reasoning was convincing and he therefore withdrew his suggestion.

12. Mr. ILLUECA said that he preferred paragraph 2 as proposed by the Drafting Committee, since it would avert lengthy debate at the diplomatic conference at which the future convention would be adopted. The replacement of the words "the diplomatic courier" by "he" could, for instance, give rise to criticism from the supporters of sexual equality. It would then be necessary to say "he or she".

13. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) explained that, in the text of a convention, the word "he" referred equally to both sexes. Also, with regard to the French text, he wondered whether the words *de ce consentement*, in the second sentence of paragraph 2, should not be replaced by *du consentement*.

14. Mr. REUTER said that, in French, the word *il* was perfectly correct, whether the courier was a man or a woman. The word *du*, before the word *consentement*, would certainly be more correct.

15. Mr. FRANCIS, agreeing with the Chairman of the Drafting Committee on the use of the masculine and femi-

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

[2] *Ibid.*

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

[4] The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook . . . 1986*, vol. II (Part Two), pp. 24 *et seq.* For the commentaries, *ibid.*, p. 24, footnote 72.

[5] For the text, see 2128th meeting, para. 100.

nine genders, said that, if Mr. Illueca's suggestion were accepted, the word "his" would also have to be replaced by the words "his or her" throughout the draft, and that would make the text unwieldy.

16. Mr. PAWLAK said that he preferred the text proposed by the Drafting Committee: it was better to be repetitious than ambiguous.

17. Mr. YANKOV (Special Rapporteur), agreeing with Mr. Francis, said that the replacement of the words "the diplomatic courier" by the word "he" would not create any ambiguity. If the Commission pursued the discussion on that point, it risked turning into a working group of the Drafting Committee.

18. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to replace the words "until the diplomatic courier", in the second sentence of paragraph 2, by "until he", to delete the definite article "the" before the word "withdrawal" in the same sentence, and to replace the words *de ce consentement*, in the French text, by *du consentement*.

It was so agreed.

19. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the only change the Drafting Committee proposed in paragraph 3 was the addition of the word "also" in the introductory clause.

20. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 9 proposed by the Drafting Committee, as amended.

Article 9 was adopted.

ARTICLE 10 (Functions of the diplomatic courier)

21. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 10, which read:

Article 10. Functions of the diplomatic courier

The functions of the diplomatic courier consist in taking custody of the diplomatic bag entrusted to him and transporting and delivering it to its consignee.

22. Article 10 defined in a brief and precise manner the functions of the diplomatic courier. The Drafting Committee had made little change to the article. For reasons of style, however, it recommended that the order of the wording be reversed. It had also replaced the words "delivering at its destination" by "delivering it to its consignee", since a "destination" could be understood in geographical terms, whereas a consignee was an entity such as a mission, consular post or delegation.

23. Mr. McCAFFREY said that article 10 was of a crucial nature, since the privileges and duties of a courier derived from his functions. The precise moment at which he assumed those functions was therefore of the utmost importance. The same could be said of the moment at which they ended, which was the subject of article 11, a provision which was lacking in clarity, since it was not clear whether a courier who travelled without a bag to a State in order to pick up a bag was already exercising his functions. Articles 10 and 11 had a repercussion on the content of article 21, which dealt with the beginning and end of privileges and immunities. In his view, therefore, that point should be clarified in the commentary to article 10.

24. Mr. YANKOV (Special Rapporteur) said that article 10 simply supplemented the existing codification conventions, which contained no similar provision. Mr. McCaffrey had, however, been right to stress the importance of defining the functions of the courier, particularly since the Commission had adopted the "functional" approach. The precise modalities for the exercise by the diplomatic courier of his functions would be explained in the commentary.

25. Mr. McCAFFREY pointed out that the Special Rapporteur had originally proposed an article in which the commencement of the functions of the diplomatic courier had been defined. The Commission had deleted that article to make the draft more concise. That was an added reason for clarifying the matter in the commentary to article 10.

26. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 10.

Article 10 was adopted.

ARTICLE 11 (End of the functions of the diplomatic courier)

27. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 11, which read:

Article 11. End of the functions of the diplomatic courier

The functions of the diplomatic courier come to an end, *inter alia*, upon:

(*a*) fulfilment of his functions or his return to the country of origin;

(*b*) notification by the sending State to the receiving State and, where necessary, the transit State that his functions have been terminated;

(*c*) notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 12, it ceases to recognize him as a diplomatic courier.

28. Stylistic changes had been made in subparagraphs (*a*) and (*b*) of the article adopted on first reading and more precision introduced in the present subparagraph (*c*) with the reference to "paragraph 2" of article 12. The Drafting Committee had also added a new subparagraph (*a*), the other subparagraphs being renumbered accordingly.

29. Although the list of cases in which the functions of the diplomatic courier came to an end was not exhaustive, as made clear by the use of the words "*inter alia*", the most frequent and normal reason for the ending of the courier's functions was undoubtedly the fulfilment of his functions or his return to the country of origin. That was worth mentioning even if the addition was not strictly essential.

30. Mr. McCAFFREY said that he was not entirely satisfied with the new subparagraph (*a*). In the first place it struck him as redundant, since what it said was that the functions of the diplomatic courier came to an end when they had been discharged. Secondly, it also said that the courier's functions came to an end upon his return to the country of origin. He therefore assumed that the cessation of functions occurred upon whichever of those two events came later. The point should be clarified in the commentary.

31. Mr. EIRIKSSON said that, in the current discussion, the beginning and end of the courier's functions should

not be confused with the beginning and end of his privileges.

32. Mr. HAYES said that article 11 had no obvious linkage with the rest of the draft and could, in his view, be dispensed with altogether. Article 10 indicated clearly enough what the functions of the diplomatic courier were, and article 21 what his privileges and immunities were.

33. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), replying to Mr. Eiriksson, said that, while there might be confusion in the discussion, there was none in the draft, where the beginning and end of the functions of the courier and the beginning and end of his privileges and immunities were dealt with in entirely separate articles. At the present stage in its work, the Commission could do no more than take note of the comment by Mr. Hayes.

34. Mr. YANKOV (Special Rapporteur) recalled that he had originally proposed an article 12 dealing with the beginning of the functions of the diplomatic courier.[6] On the advice of several Governments, the Commission and the Drafting Committee itself, that draft article had been deleted. As Mr. McCaffrey had said, the issue would have to be spelled out very clearly in the commentary because the beginning and end of the diplomatic courier's functions were materially related to his status.

35. Mr. REUTER said that the new subparagraph (*a*) seemed to imply that the diplomatic courier could return to the country of origin without having completed his functions. If such an interpretation was to be avoided, the text should read ". . . or his return to the country of origin after fulfilment of his functions".

36. Mr. AL-BAHARNA said that he, too, thought that subparagraph (*a*) needed clarification. According to article 12, the courier could be recalled, and that meant that he might return to the country of origin without completing his mission.

37. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he understood the second part of subparagraph (*a*) to refer to the case of the courier who came to a country in order to pick up a diplomatic bag and take it back to his country of origin. Subparagraph (*a*) thus covered two distinct situations.

38. Mr. YANKOV (Special Rapporteur) said that very few States employed a diplomatic courier who travelled without a diplomatic bag; the competent authorities knew how to organize itineraries in the most economical way. It was, however, conceivable that a courier might deliver a bag in Bern, for example, pick up another and deliver it in Geneva and then leave Switzerland without a bag to travel via France to Rome in order to pick up another bag. That was the sort of situation covered by subparagraph (*a*): the courier remained protected even if he was travelling without a bag.

39. Mr. REUTER noted that the Special Rapporteur's reply related to the courier's status rather than to his functions as such. He was nevertheless prepared to accept the new subparagraph (*a*) on condition that the commentary made it clear that the provision applied both to situations such as those covered by article 12 and to other circumstances, such as cases of *force majeure* in which the courier returned to the country of origin without having been able to deliver the bag he was carrying.

40. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 11 as proposed by the Drafting Committee.

Article 11 was adopted.

ARTICLE 12 (The diplomatic courier declared *persona non grata* or not acceptable)

41. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 12, which read:

Article 12. The diplomatic courier declared* persona non grata *or not acceptable.

1. The receiving State may, at any time and without having to explain its decision, notify the sending State that the diplomatic courier is *persona non grata* or not acceptable. In any such case, the sending State shall, as appropriate, either recall the diplomatic courier or terminate his functions to be performed in the receiving State. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1, the receiving State may cease to recognize the person concerned as a diplomatic courier.

42. The Drafting Committee had replaced the words "refuse to recognize", in paragraph 2, by "cease to recognize". The intention was to make the situation clearer: the receiving State notified the sending State that the courier was *persona non grata*; the sending State was then under obligation to recall the courier or to terminate his functions. It was only after the sending State had failed to comply with that obligation that the receiving State could deny recognition to the courier. That was the temporal element which the amendment was designed to bring out.

43. In addition, the Drafting Committee had deleted the words "of this article", which had appeared after the words "paragraph 1" in paragraph 2. The same solution had been adopted throughout the draft; wherever reference was made to another paragraph, it should be understood, unless otherwise indicated, that the paragraph in question was in the same article.

44. Mr. YANKOV (Special Rapporteur), replying to a question by Mr. AL-BAHARNA, explained that, as paragraph 1 of article 12 stated, the diplomatic courier could be declared *persona non grata* or not acceptable. In State practice and throughout the codification conventions, the expression "*persona non grata*" was used with reference to persons holding a diplomatic rank and the expression "not acceptable" was used in the case of technical and administrative staff.

45. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 12.

Article 12 was adopted.

[6] See *Yearbook . . . 1982*, vol. II (Part Two), p. 119, footnote 328.

ARTICLE 13 (Facilities accorded to the diplomatic courier)

46. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 13, which read:

Article 13. Facilities accorded to the diplomatic courier

1. The receiving State or the transit State shall accord to the diplomatic courier the facilities necessary for the performance of his functions.

2. The receiving State or the transit State shall, upon request and to the extent practicable, assist the diplomatic courier in obtaining temporary accommodation and in establishing contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated.

47. The Drafting Committee had made no change in the text adopted on first reading, except for the deletion of the words "as the case may be" in both paragraphs.

48. Mr. TOMUSCHAT said that he found it difficult to see how the obligation to accord the same facilities could be imposed on the receiving State and the transit State. Whereas the obligations of the receiving State derived from the existence of diplomatic or consular relations between the two countries, it was hard to see the legal basis for the obligations imposed on the transit State, which might be a State with which neither of the two others had any relations. He therefore wished to enter a reservation on that point.

49. Mr. YANKOV (Special Rapporteur) took note of the reservation, adding that the obligations of the transit State derived not only from solidarity and the duty to co-operate, but also from provisions of the 1961 Vienna Convention on Diplomatic Relations, which were reproduced in the other conventions and stated that members of the technical staff of diplomatic and consular missions enjoyed certain facilities even when in transit.

50. Mr. KOROMA, supported by Mr. FRANCIS and Mr. NJENGA, said that he had doubts about the use of the definite article in the expression "the telecommunications network", in paragraph 2.

51. Mr. YANKOV (Special Rapporteur) noted that the question did not arise in connection with either the French or the Russian texts.

52. Mr. BENNOUNA, speaking on a point of order, said that the Commission was not supposed to be discussing linguistic details in plenary; if it were, it would also have to refer, for example, to the Arabic text. He therefore proposed that only such drafting problems as had a bearing on substance should be considered.

53. Mr. TOMUSCHAT, referring to article 40, paragraph 3, of the 1961 Vienna Convention, noted that third States were required to accord privileges to diplomatic couriers to whom they had granted a visa; that suggested that there were some kind of bilateral relations between the transit State and the sending State. In the article under consideration, the transit State was not in the same situation.

54. Mr. YANKOV (Special Rapporteur) said that article 40, paragraph 4, of the 1961 Vienna Convention referred to the obligations of third States in specific cases of *force majeure*. Other situations were regarded as being covered by the general rule. In any event, State practice clearly showed that, even where a transit visa was not required, the State concerned granted facilities—at its airports, for example—to diplomatic agents in transit.

55. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 13.

Article 13 was adopted.

ARTICLE 14 (Entry into the territory of the receiving State or the transit State)

56. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 14, which read:

Article 14. Entry into the territory of the receiving State or the transit State

1. The receiving State or the transit State shall permit the diplomatic courier to enter its territory in the performance of his functions.

2. Visas, where required, shall be granted by the receiving State or the transit State to the diplomatic courier as promptly as possible.

57. He drew attention to the deletion of the words "as the case may be" in paragraph 1.

58. Mr. McCAFFREY, recalling his comments in connection with article 10 (paras. 23 and 25 above), said that it would be most helpful if the Special Rapporteur could include in the commentary a clear explanation of the scope of paragraph 1 of article 14, which manifestly implied that the obligation of the receiving State or the transit State was connected with the performance of the courier's functions. If the courier came to the receiving State or the transit State without a bag because he had to collect one *en route*, the receiving State or the transit State would be required to permit him to enter its territory. It was therefore necessary to specify that the functions of the courier included the relatively common one of going to pick up a bag at a particular place.

59. Mr. AL-BAHARNA, supported by Mr. KOROMA, suggested that the words "in the performance of his functions", in paragraph 1, be replaced by "in the course of the performance of his functions".

60. Mr. McCAFFREY said that that expression appeared in several articles of the draft and that, if the Commission accepted the amendment, it would also have to change those other articles. He wondered whether that was really the plenary Commission's role.

61. Mr. YANKOV (Special Rapporteur) said that the point of Mr. Al-Baharna's proposal was not clear. In discussing the privileges and immunities of technical staff during its preparatory work on the 1961 Vienna Convention on Diplomatic Relations, the Commission had considered whether it should use the expression "during the performance", and the same question had been raised at the diplomatic conference. The suggestion had not been accepted, since it had been thought that the functional approach should be as strict as possible. Article 14 was basically modelled on article 79 of the 1975 Vienna Convention on the Representation of States, which did not include the words in question. However, they were to be found in other conventions, such as the 1963 Vienna Convention on Consular Relations. It was thus clear that what was involved was not the time factor but, rather, the performance of the functions of the courier. If necessary, those explanations could be included in the commentary.

62. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the matter had not been discussed in the Drafting Committee, which would have been the appropriate place to do so, and that he personally saw no need to amend the text.

63. Mr. AL-BAHARNA said that he would be satisfied with an explanation of the matter in the commentary.

64. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 14 as proposed by the Drafting Committee.

Article 14 was adopted.

Mr. Graefrath took the Chair.

ARTICLE 15 (Freedom of movement)

65. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 15, which read:

Article 15. Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State or the transit State shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions.

66. The text of article 15 remained unchanged, except for the deletion of the words "as the case may be". Some doubts had been expressed in the Drafting Committee about the words "shall ensure", which had been viewed as imposing too heavy a burden on the receiving State or the transit State. The Drafting Committee had, however, noted that the article dealt not with the actual travel arrangements of the diplomatic courier, but with the principle of freedom of movement, and that the scope of the obligation placed on the receiving State or the transit State was limited by the opening proviso, "Subject to its laws . . .", as well as by the words "as is necessary for the performance of his functions". It had therefore decided to leave the text unchanged. The Spanish verb *garantizar* was not, however, an adequate equivalent of the term "ensure" and the Spanish text had been amended accordingly.

67. Mr. THIAM suggested that the words "as is necessary for the performance of his functions", which gave the impression that the diplomatic courier did not enjoy freedom of movement and travel for anything but his functions, should be deleted.

68. Mr. YANKOV (Special Rapporteur) said that the main objective of article 15 was to emphasize the functional approach with regard to the entry and freedom of movement of the courier. Naturally, the article should not be interpreted so restrictively as to prevent the courier from living a normal life. The obligation of the receiving State or the transit State was to accord the diplomatic courier the right to enter its territory and to travel in connection with the exercise of his functions, not as part of his leisure activities. The best thing might be not to alter the text of the article and to explain in the commentary how the provision was to be interpreted. Deleting the words in question would mean renouncing the functional approach followed in the entire set of draft articles, which emphasized the fact that, whenever an obligation was imposed on the receiving State or the transit State, it was confined exclusively to the courier's performance of his functions.

69. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), speaking as a member of the Commission, said that he would favour providing the relevant explanation in the commentary. According to article 15, the receiving State or the transit State must grant the diplomatic courier the freedom of movement and travel necessary for the performance of his functions because it was when he was performing his functions that the courier should enjoy more favourable treatment than other individuals. The freedom of movement and travel generally accorded to other persons would naturally be given to him as well. In other words, if the courier experienced difficulties in reaching a city where the consulate of the State of which he was a national was located, he could request assistance from the receiving State. If he wished to take a trip to the mountains at the weekend, however, he would be treated as a tourist.

70. The CHAIRMAN suggested that the words "such freedom of movement and travel in its territory as is necessary for the performance of his functions" might be replaced by "the freedom of movement and travel necessary for the performance of his functions in its territory".

71. Mr. THIAM said that he could accept the original text as long as the Special Rapporteur explained in the commentary that the diplomatic courier enjoyed the same freedom of movement and travel as any other visitor to the country.

72. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 15 as proposed by the Drafting Committee, on the understanding that the explanations requested by Mr. Thiam would be given in the commentary.

It was so agreed.

Article 15 was adopted.

ARTICLE 16 (Personal protection and inviolability)

73. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 16, which read:

Article 16. Personal protection and inviolability

The diplomatic courier shall be protected by the receiving State or the transit State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

74. The text adopted by the Commission on first reading had been left unchanged, except for the deletion, as elsewhere, of the words "as the case may be".

75. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 16.

Article 16 was adopted.

ARTICLE 17 (Inviolability of temporary accommodation)

76. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 17, which read:

Article 17. Inviolability of temporary accommodation

1. The temporary accommodation of the diplomatic courier shall, in principle, be inviolable. However:

(*a*) prompt protective action may be taken if required in case of fire or other disaster;

(*b*) inspection or search may be undertaken where serious grounds exist for believing that there are in the temporary accommodation articles the possession, import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State.

2. In the case referred to in paragraph 1 (*a*), measures necessary for the protection of the diplomatic bag and its inviolability shall be taken.

3. In the case referred to in paragraph 1 (*b*), inspection or search shall be conducted in the presence of the diplomatic courier and on condition that it be effected without infringing the inviolability either of the person of the diplomatic courier or of the diplomatic bag and will not unduly delay or impede the delivery of the diplomatic bag. The diplomatic courier shall be given the opportunity to communicate with his mission in order to invite a member of that mission to be present when the inspection or search takes place.

4. The diplomatic courier shall, to the extent practicable, inform the authorities of the receiving State or the transit State of the location of his temporary accommodation.

77. Article 17 had been the subject of much discussion in the Commission and of many comments by Governments, basically on two points: whether the temporary accommodation of the diplomatic courier should be said to be inviolable and, if so, to what extent; and under what conditions that inviolability could be put aside.

78. On the first point, the Drafting Committee had come to accept the view that the inviolability of the temporary accommodation of the courier was directly linked to better protection of the inviolability of the diplomatic bag. The proposed text should be approached with that in mind. The inviolability of the diplomatic bag might be affected if the receiving State or the transit State were accorded a general right of access to the temporary accommodation of the courier, with the possibility of conducting inspections or searches. That was why the Drafting Committee had considered that, *in principle*, the temporary accommodation of the diplomatic courier should remain inviolable.

79. As to the second point, the Drafting Committee had taken the view that the matter really boiled down to how to maintain a reasonable balance between respect for the inviolability of the temporary accommodation and the need for the receiving State or the transit State to take protective action in emergency situations, such as fires or other disasters, which threatened the temporary accommodation of the diplomatic courier. There might also be situations where there were reasonable grounds to believe that there were prohibited articles in the courier's temporary accommodation and that a search or inspection would be justified. It was with those considerations in mind that the Drafting Committee had rearranged article 17.

80. Paragraphs 1 and 3 of the text adopted on first reading dealt with the principle of inviolability, the exceptions to it and the conditions attaching to those exceptions. The Drafting Committee had thought that it would be more logical to reorganize the ideas expressed in those two paragraphs in the following way: (i) to state the principle of inviolability; (ii) to state the exceptions to that principle; (iii) to state the conditions attaching to the exceptions.

81. Paragraph 1 of the new text enunciated the general rule that the temporary accommodation of the diplomatic courier was inviolable. The words "in principle", however, immediately introduced an element of flexibility, suggesting the exceptions which appeared in subparagraphs (*a*) and (*b*). Subparagraph (*a*) was basically the final part of paragraph 1 of the text adopted on first reading. It provided that inviolability might be disregarded when fire or other disaster required prompt protective action by the receiving State or the transit State. Subparagraph (*b*) was basically the first part of paragraph 3 of the adopted text. It allowed inspection or search by the authorities of the receiving State or the transit State when there were serious grounds for believing that, in the temporary accommodation of the courier, there were articles whose possession, import or export was prohibited by the law of the receiving State or the transit State or controlled by their quarantine regulations.

82. Paragraphs 2 and 3 of the new text set forth the conditions under which the exceptions stated in paragraph 1 (*a*) and (*b*) were allowed.

83. Paragraph 2 was taken from the former paragraph 1 and paragraph 3 from the former paragraph 3. The second sentence of paragraph 3 was new. Since the situation referred to in paragraph 1 (*b*) was not an emergency and did not normally require the same prompt protective action as was required in emergencies, the diplomatic courier should be given an opportunity to contact his mission in order to invite a member of the mission to be present during the inspection or search. In the Drafting Committee's view, it would be useful to have a member of the mission present when, for example, the diplomatic courier did not speak the language of the receiving State or the transit State. It must be noted, however, that the provision did not require that the inspection or search be delayed until a member of the mission arrived. The matter would be decided according to the circumstances and on the basis of common sense. If a member of the mission could arrive quickly, the authorities of the receiving State or the transit State should wait for him before conducting the inspection or search. If a long wait would be necessary, the inspection or search could take place without waiting for his arrival. The commentary would explain why that provision had not been couched in more clear-cut terms.

84. Paragraph 4 reproduced, without change, paragraph 2 of the text adopted on first reading. The application of article 17 was possible only if the receiving State or the transit State knew where the temporary accommodation of a diplomatic courier was located. It was therefore desirable for the courier to inform the authorities of his accommodation's location. That should not, however, be a hard and fast obligation: it would be governed by the circumstances, as indicated by the expression "to the extent practicable".

85. Mr. McCAFFREY said that he could not accept article 17, although he would not object to its adoption. In the first place, it did not require that the diplomatic courier be in possession of the diplomatic bag, which was the object of the protection in question. Secondly, the article imposed too heavy a burden on the receiving State or the transit State and went far beyond the protection necessary for the diplomatic courier to perform his functions.

86. Mr. OGISO said he did not think that the question was resolved by the codification conventions. He could therefore not support article 17 and, in particular, paragraph 1 and its opening sentence, and thus reserved his position.

87. Mr. TOMUSCHAT said that he was also unable to accept article 17 because it imposed too heavy a burden on the States concerned, and particularly on the transit State, which was not supposed to know that a diplomatic bag

was to be found in the temporary accommodation of the diplomatic courier. The article was, moreover, unnecessary, since article 16 would be more than enough. The inclusion of article 17 in the draft could only hinder acceptance of the future instrument. Nevertheless, he would not oppose the adoption of the article if the majority of the members of the Commission considered it necessary in order to protect the diplomatic courier.

88. Mr. HAYES said that he found article 17 both unnecessary and difficult to apply in practice, but he would not oppose its adoption.

89. Mr. KOROMA said that, although he would not oppose article 17, he thought that, in view of the comments made by Mr. McCaffrey and Mr. Tomuschat, the Commission should perhaps review it in order to specify that its purpose was to protect the diplomatic bag.

90. Mr. BEESLEY said that he had strong reservations about article 17: it was an exception—albeit non-intentional—to the generally practical and functional approach of the other draft articles; there was no precedent for it and it might be dangerous to establish one; it imposed too heavy a burden, and an unnecessary one, on the receiving State or the transit State; it was not needed, because it had nothing to do with the performance of the functions of the diplomatic courier and might even be an obstacle to the acceptance of the future instrument; it would involve many practical problems as regards the application of the draft articles; and it appeared to refer to the protection of the diplomatic courier—paradoxically, even if he was not accompanied by a diplomatic bag—rather than to that of the diplomatic bag itself.

91. Mr. ROUCOUNAS said that he also had reservations about article 17, which, in his view, was superfluous, particularly since it was rather long. The draft contained articles of fundamental importance, such as articles 15 and 16, which, in a few words, fully guaranteed the protection of the diplomatic courier. Article 17, however, with all its subdivisions, exceptions, cross-references to exceptions and explanations, showed how difficult it was to provide for situations that went far beyond what a well-balanced draft could cover. Nevertheless, he would not oppose the adoption of the article.

92. Mr. AL-BAHARNA said that, in view of the strong objections which had been raised, it might be wiser to take some time for reflection. He reserved his position.

93. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), speaking as a member of the Commission, pointed out that the reservations which had been expressed were not new and that, on first reading, the majority of the members of the Commission had stated that they were in favour of an article on the inviolability of temporary accommodation. The article was too long precisely because the Drafting Committee and the Special Rapporteur had tried to draft a flexible provision allowing not for the total inviolability of the temporary accommodation of the diplomatic courier, but only for the necessary inviolability. That was why the article contained so many conditions and so many exceptions. The fact that Governments might or might not accept the future instrument did not justify the deletion of article 17. Governments would have an opportunity to state their position at the diplomatic conference or in the Sixth Committee of the General Assembly. In his view, the Commission should retain the articles which had attracted majority support and he believed that that was the case of article 17.

94. Mr. AL-KHASAWNEH said that he endorsed the comments made by Mr. Calero Rodrigues.

95. Mr. KOROMA said that he also believed the Commission should allow itself some time for reflection and come back to article 17 a little later.

96. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he could agree to that suggestion, but would like to know the Special Rapporteur's opinion.

97. Mr. YANKOV (Special Rapporteur) said that he had no solution to propose at the present stage to take account of the reservations expressed during what had been a lengthy discussion. On the basis of his research, he had not expected article 17 to give rise to objections. In actual fact, the article was only a matter of the good will and common sense of the parties concerned, in the interests of official communications.

98. The CHAIRMAN said that it might be possible to explain in the commentary that article 17 dealt with the diplomatic courier accompanied by a diplomatic bag, although that point seemed to be clear from paragraphs 2 and 3.

99. Mr. KOROMA suggested, along the same lines, that the beginning of paragraph 1 should be amended to read: "The temporary accommodation of the diplomatic courier accompanied by a diplomatic bag shall . . .".

100. Mr. BARBOZA said that now was not the time to reopen the debate on an article which, like the other articles, reflected at least the majority view, if not a consensus. In any event, the different positions would be reflected in the summary record of the meeting.

101. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, although Mr. Koroma's idea was an interesting one, it would be difficult to find wording to express it: who could be sure that a diplomatic bag was in the temporary accommodation of the diplomatic courier? The Special Rapporteur might nevertheless consider the question.

102. The CHAIRMAN requested the Special Rapporteur to study Mr. Koroma's suggestion and inform the Commission of his conclusions at the next meeting.

103. Mr. EIRIKSSON said he hoped that, at the same time, the Special Rapporteur would take another look at the English text of paragraph 3, which was grammatically unsound.

Mr. Sreenivasa Rao, First Vice-Chairman, took the Chair.

Closure of the International Law Seminar

104. Mr. MARTENSON (Director-General of the United Nations Office at Geneva) said that, at the twenty-fifth session of the International Law Seminar, students, young professors specializing in international law and jurists at the start of their careers and dealing with questions of international law had had an opportunity to broaden their

knowledge, follow the Commission's work and familiarize themselves with questions relating to the codification and progressive development of a discipline that was in the throes of change. The Seminar had also provided an opportunity for a constructive confrontation of viewpoints by jurists from different legal and political systems on the topics with which the Commission was dealing. The participants had been able to discover the extraordinary vastness of a discipline which, in a few decades, had become an essential branch of the law. International law, which had for a long time governed only inter-State relations in matters of foreign policy, was now becoming concerned with the many economic, technical, cultural or even humanitarian aspects of human endeavour.

105. One important aspect of such endeavour was the promotion and protection of human rights. In that field, the United Nations had adopted a triangular approach. It had almost completed the legislative phase: the legal infrastructure was now in place (although there was still a great deal to be done in sectors such as development and migrant workers) and it went from the Universal Declaration of Human Rights to the International Covenants to a whole range of instruments, the next of which should be the convention on the rights of the child. The United Nations now had to give priority to the implementation of those instruments, which had to become a reality for everyone. It could not rush 159 sovereign States, but it had given new life to the concept of advisory services and technical assistance and it was helping Member States to build the necessary national infrastructure for the promotion and protection of human rights. In co-operation with the regional organizations, it was engaged in the human rights training of law-enforcement officials, the translation of the relevant international instruments into local languages, the adaptation of domestic legislation and the organization of courses and seminars. Those efforts had been made possible by the generous contributions of Member States to a trust fund. In addition to the legal infrastructure and the implementation of instruments, there had to be a campaign to keep public opinion informed—and that was the third aspect of the activities being carried on by the United Nations. Individuals had to be informed of their rights and of the obligations of the State towards them and learn that they could rely on the United Nations for assistance.

106. In conclusion, he said that the Centre for Human Rights was at the service of any of the participants in the Seminar who might wish to contact it.

107. Mr. BULA BULA, speaking on behalf of the participants in the International Law Seminar, said that they had welcomed the opportunity of attending the Commission's instructive debates, from which they had learned valuable lessons that would soon benefit their respective countries. The informal meetings had also given them an opportunity to participate unofficially in the discussion of ideas. They would always remember the moot meeting at which future professors and ambassadors had practised, in the presence of members of the Commission, criticizing a genuine work on the codification and development of international law. It was to be hoped that that initiative would take place again in the future. He thanked the Commission for allowing the participants in the Seminar to benefit from its work and the staff of the Legal Liaison Office of the United Nations Office at Geneva for their assistance. He also thanked the Swiss authorities for their country's hospitality.

The Director-General presented the participants with certificates attesting to their participation in the twenty-fifth session of the International Law Seminar.

The meeting rose at 1.05 p.m.

2130th MEETING

Tuesday, 4 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/409 and Add.1-5,[1] A/CN.4/417,[2] A/CN.4/420,[3] A/CN.4/L.431, sect. E, A/CN.4/L.432, ILC(XLI)/Conf.Room Doc.1)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING[4] (*continued*)

ARTICLE 17 (Inviolability of temporary accommodation)[5] (*concluded*)

1. The CHAIRMAN invited the Special Rapporteur to report on the results of the consultations held to find a generally acceptable formula for article 17.

2. Mr. YANKOV (Special Rapporteur) said that it was proposed to make certain changes in paragraph 1 in order to take account of the observations made by several members, including Mr. McCaffrey and Mr. Al-Baharna (2129th meeting), who had pointed out that the inviolability of the temporary accommodation of a diplomatic courier was not confined to his person but related principally to

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

[2] *Ibid.*

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

[4] The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook . . . 1986*, vol. II (Part Two), pp. 24 *et seq.* For the commentaries, *ibid.*, p. 24, footnote 72.

[5] For the text, see 2129th meeting, para. 76.

the bag he was carrying. It was not the person of the courier, but rather his function that was at stake, and his main function was to carry and deliver the diplomatic bag.

3. For those reasons, he now proposed the insertion in paragraph 1, after the words "temporary accommodation of the diplomatic courier", of the additional phrase "carrying a diplomatic bag". The words that followed, "shall, in principle", would be amended to read: "should, in principle", thereby bringing article 17 into line with article 9, paragraph 1, where the same formula had been used.

4. In the first sentence of paragraph 3, a minor drafting change was proposed by altering the words "be effected" to "is effected".

5. Mr. McCAFFREY said that he welcomed the proposed addition to paragraph 1, which was helpful and largely removed his main objection to article 17. In the text proposed initially, the article had focused on the courier and appeared to ignore the bag. Equally, he welcomed the proposed change from "shall" to "should", which made the obligation set forth in the article more flexible. He still believed that article 17 was not really necessary, but he would not oppose it in the form now proposed. Lastly, as a matter of grammar, he preferred the expression "be effected" to "is effected" in paragraph 3.

6. Mr. AL-BAHARNA said that he, too, welcomed the changes proposed for paragraph 1, which made article 17 quite acceptable.

7. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he had a strong preference for the formula "shall, in principle", which the Drafting Committee had adopted after considerable discussion. The words "in principle" made for the necessary flexibility and "shall, in principle" was virtually equivalent to "should". The attempt to combine "should" with "in principle" would introduce an undesirable additional element of flexibility.

8. The CHAIRMAN pointed out that, if the formula "shall, in principle" were retained in article 17, the Commission would have to go back on its decision to use the words "should in principle" in article 9.

9. Mr. FRANCIS said that there was no real parallelism between the use of the expression "should in principle" in article 9 and the proposal for paragraph 1 of article 17. Article 9 dealt with the nationality of the diplomatic courier, and the purpose of the statement in paragraph 1 that the courier "should in principle" be a national of the sending State was to afford the sending State more freedom in the matter. Article 17 dealt with the inviolability of the diplomatic bag in the hands of the courier, for which purpose the courier's temporary accommodation must be inviolable. The relevant rule therefore constituted an absolute norm. Like all rules, it had certain exceptions, which were preceded by the word "However". The existence of the exceptions set forth in paragraph 1 (*a*) and (*b*) did not affect the basic inviolability of the courier's accommodation, his person and the bag. For those reasons, he would strongly urge that the formula "shall, in principle" be retained.

10. Mr. REUTER said that he deplored the tendency—one which had been increasing since the 1982 United Nations Convention on the Law of the Sea—to use the conditional in drafting international conventions. The practice should be discouraged.

11. Mr. BENNOUNA said that he agreed with Mr. Reuter. He was in favour of using the expression *doit en principe* ("shall, in principle"). A formula such as *devrait en principe* ("should, in principle") was unacceptable, for it was far too weak.

12. Mr. YANKOV (Special Rapporteur) pointed out that use of the formula "should, in principle" went back much further than 1982. It was to be found, for example, in article 22 of the 1963 Vienna Convention on Consular Relations. Actually, his own preference was for "shall" rather than "should" in both article 9 and article 17, but the same form of language had to be used in both articles for the sake of consistency.

13. Mr. AL-BAHARNA said he agreed that the same formulation should be used in both articles in the interests of consistency. His own preference was for the word "should".

14. Mr. McCAFFREY said that he would have preferred the word "shall" in article 9, but very great flexibility was necessary for article 17, in view of the comments made by Governments. Choosing between "shall" and "should" was not a drafting matter: it was a point of substance. Furthermore, the words "in principle" made for even greater flexibility and must be retained.

15. Mr. BENNOUNA said he concurred that the discussion was one of substance and not of drafting. The use of the words "in principle" stressed the fact that inviolability was the principle and that the exceptions were those set forth in paragraph 1 (*a*) and (*b*) after the word "However". In that way, it was clear that the cases mentioned were the only exceptions. In all other cases, the principle of inviolability prevailed. If the mandatory "shall" were replaced by the conditional "should", article 17 would not be stating a legal rule at all.

16. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) stressed the difference in the treatment of articles 9 and 17 by the Drafting Committee. For article 9, the Committee had decided to retain the language used in the text adopted on first reading, namely the verb form "should". In the case of article 17, the Committee had introduced the words "in principle" and had naturally felt that the word "shall" must therefore be used instead of "should". Accordingly, he could only recommend that the Commission retain the text adopted by the Drafting Committee, with the formula "shall, in principle".

17. Mr. DÍAZ GONZÁLEZ said that he would not enter into the grammatical subtleties of other languages, but he wished to make the position clear as far as the Spanish text was concerned. The words *es inviolable, en principio* set forth a clear legal rule. The present tense *es* had a mandatory effect. To replace it by the conditional *sería* would suggest that there was no rule of inviolability. The only correct course for the Commission was to retain the words *es inviolable, en principio*, which unequivocally set out the principle of inviolability and were followed, of course, by the exceptions in paragraph 1 (*a*) and (*b*).

18. Mr. MAHIOU said that he shared the views of Mr. Díaz González and Mr. Bennouna. The correct term to use was *doit* ("shall").

19. Mr. ARANGIO-RUIZ said that the words "in principle" provided sufficient flexibility. There was no need to introduce still more by using the word "should". Like other members, he preferred the word "shall".

20. Mr. FRANCIS said he wished to stress that article 9 was intended to give the sending State considerable flexibility in appointing a diplomatic courier; hence the rule set forth in that article was necessarily weak. The position with regard to article 17 was completely different, since the article established the basic rule of inviolability, which had to be expressed in strong terms.

21. Moreover, paragraph 2 of article 17 stated that "measures necessary for the protection of the diplomatic bag and its inviolability shall be taken" in the event of fire or other disaster when prompt protective action could be taken under paragraph 1 (*a*). If the rule in the opening sentence of paragraph 1 were to be weakened by using the words "should, in principle", there would be no need for the provision in paragraph 2.

22. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) explained that there was a difference between the two changes now proposed by the Special Rapporteur to paragraph 1. The first change, namely the introduction of the words "carrying a diplomatic bag" had not been discussed in the Drafting Committee; it had been proposed in the Commission by Mr. Koroma (2129th meeting, para. 99). Personally, he had supported it as a good idea. The other change, namely the replacement of the word "shall" by "should", had been discussed at length in the Drafting Committee and he had strongly opposed it for the reasons already given.

23. Further to a brief discussion on the proposal to replace the words "be effected" by "is effected" in paragraph 3, in which Mr. TOMUSCHAT, Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) and Mr. PAWLAK took part, Mr. HAYES pointed out that, if the correct grammatical form "be effected" were retained, the words "and will not unduly delay", in the same sentence, would have to be amended to read: "and would not unduly delay".

24. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 17 on the understanding, first, that the words "carrying a diplomatic bag" would be inserted after "the diplomatic courier" in the first sentence of paragraph 1, and would be followed by the existing wording: "shall, in principle, be inviolable"; and secondly, that, in paragraph 3, the words "be effected" would be retained and the phrase "will not unduly delay" would be amended to read: "would not unduly delay".

It was so agreed.

Article 17 was adopted.

ARTICLE 18 (Immunity from jurisdiction)

25. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 18, which read:

Article 18. Immunity from jurisdiction

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or the transit State in respect of acts performed in the exercise of his functions.

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or the transit State in respect of acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident involving a vehicle the use of which may have entailed the liability of the courier to the extent that those damages are not recoverable from insurance. Pursuant to the laws and regulations of the receiving State or the transit State, the courier shall, when driving a motor vehicle, be required to have insurance coverage against third-party risks.

3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under paragraph 2 and provided that the measures concerned can be taken without infringing the inviolability of his person, his temporary accommodation or the diplomatic bag entrusted to him.

4. The diplomatic courier is not obliged to give evidence as a witness on matters connected with the exercise of his functions. He may, however, be required to give evidence on other matters, provided that this would not unduly delay or impede the delivery of the diplomatic bag.

5. The immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

26. In dealing with article 18, the Drafting Committee had borne in mind that the text adopted on first reading represented a compromise based on a functional approach leading to qualified immunity from jurisdiction. In order to avoid upsetting the delicate balance achieved in the text, it had kept changes to a minimum. The only substantive modification consisted in adding at the end of paragraph 2 a new sentence, proposed by the Special Rapporteur on the basis of the written comments of a Government, reading: "Pursuant to the laws and regulations of the receiving State or the transit State, the courier shall, when driving a motor vehicle, be required to have insurance coverage against third-party risks."

27. As to drafting changes, the first two applied to both paragraphs 1 and 2 and consisted in the elimination of the phrase "as the case may be" and the deletion of the word "all" before "acts", which the Drafting Committee considered redundant. The Committee had taken the view that the words "caused by", in the second sentence of paragraph 2, were inappropriate inasmuch as the cause of an accident could not be determined *a priori*. They had therefore been replaced by "involving". As a result, and to avoid repetition, the words "may have entailed" had been substituted for "may have involved". The word "where" before the words "those damages", at the end of paragraph 2, had been replaced by the words "to the extent that", bearing in mind the fact that the damages might be partly recoverable from insurance.

28. The Drafting Committee had deleted the words "of this article" in paragraph 3 and, for purely grammatical reasons, had inserted the word "his" before "temporary accommodation".

29. The words "in cases involving", in paragraph 4, had been replaced by "on matters connected with", a phrase which the Drafting Committee found to be more precise and which was borrowed from article 44, paragraph 3, of the 1963 Vienna Convention on Consular Relations. A consequential change had been made in the second sentence of paragraph 4. The word "however" had been introduced after the words "He may", in that sentence, in order to emphasize that the field of application of the first and second sentences and the approach reflected therein were different. Finally, the phrase "cause unreasonable delays

or impediments to" had been replaced by "unduly delay or impede", which seemed simpler and stylistically more elegant.

30. Mr. AL-BAHARNA suggested that, in view of the change which had been made in article 17 and which made inviolability conditional on the courier carrying the bag, a proviso should be inserted in paragraph 3 of article 18 whereby the provisions of that paragraph were subject to those of article 17.

31. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that it was not necessary to introduce such a proviso; paragraph 3 was subject to all of the articles of the draft.

32. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 18 as proposed by the Drafting Committee.

Article 18 was adopted.

ARTICLE 19 (Exemption from customs duties, dues and taxes) *and*

ARTICLE 20 (Exemption from examination and inspection)

33. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the texts proposed by the Drafting Committee for articles 19 and 20, which read:

Article 19. Exemption from customs duties, dues and taxes

1. The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit entry of articles for the personal use of the diplomatic courier carried in his personal baggage and grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.

2. The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or the transit State from all dues and taxes, national, regional or municipal, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

Article 20. Exemption from examination and inspection

1. The diplomatic courier shall be exempt from personal examination.

2. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not for the personal use of the diplomatic courier or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. Such inspection shall be conducted in the presence of the diplomatic courier.

34. He wished to introduce the two articles together because their positions had been reversed since the first reading and also because a paragraph of the former article 19 had been transferred to the former article 20. He asked for the Commission's indulgence for the very detailed introduction he was about to make: the summary record of the present meeting would be the only place where an extensive explanation of the changes could be found.

35. Members would recall that article 19 as adopted on first reading had dealt with three issues: exemption from personal examination of the courier; customs duties; and inspection of the courier's personal baggage. Article 20 had dealt only with exemption from dues and taxes for which the courier might be liable during his stay in the receiving State or the transit State. In terms of structure, it would be recalled that, at the previous session, the Special Rapporteur had recommended deleting paragraph 1 of the former article 19, concerning personal examination of the courier, or moving it to article 16, on personal protection and inviolability, and had suggested that the remaining paragraphs of articles 19 and 20 be combined in a single article. However, the Drafting Committee had decided to retain the paragraph on personal examination of the courier and, in view of that decision, had deemed it advisable to separate the provisions on personal examination of the courier and inspection of baggage from those on fiscal matters (customs duties, dues and taxes). As a result, paragraph 2 of the former article 19, on customs duties, had become paragraph 1 of the former article 20, on dues and taxes. Since exemption from customs duties, dues and taxes was more closely related to immunity, which was the subject of article 18, the Drafting Committee had decided to move article 20 closer to article 18. Hence the former article 20 was now article 19 and the former article 19 was now article 20.

36. As to substance, the Drafting Committee had made two drafting changes in paragraph 1 of the current article 19 (paragraph 2 of the former article 19). One was the deletion of the phrase "as the case may be" and the other was the replacement of the word "imported" by "carried", which was thought to be more appropriate in the context of items in the courier's personal baggage.

37. Paragraph 2 of article 19 (formerly the sole paragraph of article 20) had not given rise to many comments in the Drafting Committee. Although the courier's stay in the receiving or transit State was usually very short and it was unlikely that he would be subject to taxation, the Committee had considered it advisable to retain the paragraph so as to cover all eventualities. Once again, few drafting changes had been made: the phrase "as the case may be" had been deleted, as had the phrase "for which he might otherwise be liable", which the Committee had thought to be superfluous. The title of the new article 19 had been changed to "Exemption from customs duties, dues and taxes", which described the content of the article more accurately.

38. Paragraph 2 of the current article 20, which was, of course, paragraph 3 of the former article 19, had not attracted much comment: the only drafting change was the deletion of the phrase "as the case may be". As for paragraph 1, opinion in the Drafting Committee had been divided as to whether there should be any provision explicitly dealing with exemption from personal examination of the courier. The difference of opinion had not pertained to the principle involved: all members of the Committee had seemed to agree that the diplomatic courier should be exempt from personal examination. However, some members had taken the view that the provision contained in paragraph 1 was unnecessary because the inviolability of the courier affirmed in article 16 implied exemption from personal examination. After extensive debate, the view had prevailed that, even if the provision was not strictly necessary, it might be useful to underline that aspect of inviolability, which certainly had very practical significance, in article 20.

39. Mr. TOMUSCHAT said that, in his view, article 19 was superfluous and should not be adopted. The diplomatic courier normally stayed only a very short time in the territory of the State to which he was carrying a bag. The provision would create enormous administrative difficulties,

which were no doubt justified in the case of resident diplomats but not in that of persons entering a country for a very short stay.

40. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that Mr. Tomuschat's objection might apply to paragraph 2 of article 19 but it certainly did not apply to paragraph 1, where the fact of entry into the territory of the receiving State or the transit State, rather than the duration of the stay, was the point at issue. The courier might well be subject to customs duties, dues and taxes on items he imported for his personal use.

41. Mr. EIRIKSSON said that he had no objection to the substance of article 20 but thought that the final sentence of the English text should be brought more closely into line with the French and Spanish.

42. The amendment made to article 8, on the documentation of the diplomatic courier (see 2128th meeting, paras. 92-99), did not improve its clarity in English, and the Commission might wish to consider revising it.

43. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt articles 19 and 20, on the understanding that the final sentence of the English text of article 20 would be brought more closely into line with the French and Spanish.

It was so agreed.

Articles 19 and 20 were adopted.

ARTICLE 21 (Beginning and end of privileges and immunities)

44. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 21, which read:

Article 21. Beginning and end of privileges and immunities

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions.

2. The privileges and immunities of the diplomatic courier shall cease at the moment when he leaves the territory of the receiving State or the transit State, or on the expiry of a reasonable period in which to do so. However, the privileges and immunities of the diplomatic courier *ad hoc* who is a resident of the receiving State shall cease at the moment when he has delivered to the consignee the diplomatic bag in his charge.

3. Notwithstanding paragraph 2, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

45. Article 21 dealt with the beginning and the end of the diplomatic courier's privileges and immunities and, in order to bring out those two aspects more clearly, the Drafting Committee had modified the title. With the same purpose in mind, it had decided to deal with the two aspects in separate paragraphs.

46. Paragraph 1 corresponded to the first sentence of paragraph 1 of the text adopted on first reading, except, once again, for the deletion of the words "as the case may be". Paragraph 2, on the end of the courier's privileges and immunities, opened with what had been the second sentence of the former paragraph 1, incorporating a few minor editing changes required by the transfer of that sentence to a new position at the beginning of a paragraph. A more substantial modification lay in the addition of the words "or on the expiry of a reasonable period in which to do so" at the end of the sentence. The former text had stated, as a general rule, that the privileges and immunities of a courier "normally" ceased when he left the territory of the receiving or transit State. An exception to the rule, set out in the former paragraph 2, was that, when the courier was declared *persona non grata* or not acceptable, his privileges and immunities ceased when he left the territory or on the expiry of a reasonable period in which to do so. The Drafting Committee had taken the view that the same principle should be applied to all couriers; there was no reason for any courier to continue to enjoy privileges and immunities if he remained in the territory of the receiving or transit State for a long period after the completion of his functions. In such a case, the receiving or transit State should be entitled to give the courier a reasonable period in which to depart, and to cease to accord him privileges and immunities on the expiry of that period. As a result of adding the words "or on the expiry of a reasonable period in which to do so" at the end of the first sentence of paragraph 2, the former paragraph 2 had become pointless and had therefore been deleted.

47. The second sentence of paragraph 2 corresponded to the last sentence of the former paragraph 1 and provided for a second exception to the rule that privileges and immunities ceased at the moment of the courier's departure from the territory of the receiving State. The provision adopted on first reading had established that the privileges and immunities of a courier *ad hoc* ceased at the moment he had delivered the bag to its consignee, the intention being not to discriminate against the courier *ad hoc* but to cover the case of a courier who, being a resident of the receiving State, should not continue to enjoy privileges and immunities after he had delivered the bag. In order to make that point clear, the text now spoke of the courier *ad hoc* "who is a resident of the receiving State".

48. Paragraph 3 was identical to paragraph 3 of the text adopted on first reading, except that the reference to "the foregoing paragraphs" had been replaced by a reference to "paragraph 2".

49. Mr. BENNOUNA asked why the word "immunity" was used in the singular in paragraph 3, whereas paragraphs 1 and 2 and the title of article 21 spoke of "privileges and immunities" in the plural. Secondly, what was the precise relationship between paragraphs 2 and 3 of the article? Surely, once the courier had left the territory of the receiving State, he could perform no further acts in the exercise of his functions.

50. Mr. MCCAFFREY said that he was not raising an objection to article 21 but merely wished to reiterate a point he had made in connection with articles 10 and 11 with regard to the duration of the courier's functions. While it was, of course, impossible to list every possible eventuality, it would be helpful if the commentary could specify that article 21 covered such situations as, for example, when the courier had delivered a bag but had not collected another bag.

51. Mr. YANKOV (Special Rapporteur) said that article 21 was modelled on the corresponding provisions of the codification conventions, namely article 39 of the 1961 Vienna Convention on Diplomatic Relations, article 53 of the 1963 Vienna Convention on Consular Relations,

article 43 of the 1969 Convention on Special Missions and articles 38 and 68 of the 1975 Vienna Convention on the Representation of States. As to Mr. McCaffrey's point, an explanation concerning the functions of the courier would be incorporated in the commentary along the lines suggested. In response to Mr. Bennouna, he said that paragraph 3 was designed to protect the diplomatic courier in respect of acts performed in the exercise of his functions. The commentary to the article as adopted on first reading dealt with the matter at some length.[6]

52. Mr. KOROMA remarked that the functions of the diplomatic courier, as defined in article 10, included taking custody of the diplomatic bag as well as transporting it and delivering it to the consignee. In his view, paragraph 3 of article 21 should be understood to apply only to the second and third of those functions and not to the first.

53. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 21.

Article 21 was adopted.

ARTICLE 22 (Waiver of immunities)

54. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 22, which read:

Article 22. Waiver of immunities

1. The sending State may waive the immunities of the diplomatic courier.

2. The waiver shall, in all cases, be express and shall be communicated in writing to the receiving State or the transit State.

3. However, the initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction in respect of judicial proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment or decision, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil action, it shall use its best endeavours to bring about an equitable settlement of the case.

55. The Drafting Committee had considered at some length whether the scope of article 22 should be limited to immunity from jurisdiction and had reached the conclusion that the decision to proceed to a waiver could extend to immunities other than those relating to jurisdiction; accordingly, it had decided to keep the word "immunities" in the plural. The title and paragraph 1 of the article were unchanged.

56. In paragraph 2, the Drafting Committee had eliminated the words "except as provided in paragraph 3 of this article". In its opinion, the situation envisaged in paragraph 3 was not a situation of waiver *stricto sensu*; indeed, in article 32 of the 1961 Vienna Convention on Diplomatic Relations, the situation in question was not presented as an exception to the rule that the waiver had to be express in all cases. A second change made by the Drafting Committee in paragraph 2 consisted in adding the phrase "to the receiving State or the transit State", which was intended to clarify the text in keeping with article 45, paragraph 2, of the 1963 Vienna Convention on Consular Relations. The other changes made in paragraph 2, all of which were of a minor nature, concerned the English text only: a definite article had been inserted at the beginning of the paragraph and the word "must" had been replaced by "shall" for reasons of consistency.

57. In paragraph 3, the only change consisted in the insertion of the word "However" at the beginning, so as to make it clear that, although the situation referred to in the paragraph was not, in the Drafting Committee's view, a situation of waiver *stricto sensu*, the rule enunciated therein none the less resulted in the receiving or transit State's exercising its jurisdiction without a formal waiver.

58. With regard to paragraph 4, the Drafting Committee had considered that the requirement of a separate waiver for execution should apply not only in respect of civil or administrative proceedings, but also in respect of criminal proceedings. To make the text comprehensive, it had replaced the words "civil or administrative proceedings" by "judicial proceedings", using the expression *procédure juridictionnelle* in the French text. Consequently, the Committee had replaced the word "judgment" by the more general expression "judgment or decision", taking into account the fact that, under certain legal systems, the outcome of legal proceedings, particularly administrative proceedings, was not necessarily designated by the term "judgment".

59. The Drafting Committee had decided to retain paragraph 5 as adopted on first reading. It had agreed that the possibility of the sending State bringing about a settlement—typically, through the payment of compensation—when immunity was not waived would in most cases arise in the context of a civil action, but it had thought that, if such an issue arose in connection with criminal proceedings, resort to the practical method envisaged in paragraph 5 for arriving at a settlement through negotiation should not be excluded. The point would be elaborated on in the commentary. The Committee had agreed that, given the *ex gratia* nature of the solution envisaged in paragraph 5, the word "just" should be replaced by "equitable", which was also the term used in the French text.

60. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 22.

Article 22 was adopted.

ARTICLE 23 (Status of the captain of a ship or aircraft entrusted with the diplomatic bag)

61. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 23, which read:

Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag

1. The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag.

2. The captain shall be provided with an official document indicating the number of packages constituting the bag entrusted to him, but he shall not be considered to be a diplomatic courier.

3. The receiving State shall permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him.

[6] See *Yearbook . . . 1985*, vol. II (Part Two), pp. 43-44, paras. (5)-(6) of the commentary.

62. The Drafting Committee had considered a proposal by the Special Rapporteur, based on comments by Governments, to include the words "or an authorized member of the crew" after the word "captain" in paragraphs 1, 2 and 3. While some members had held that such an addition would take account of the practice followed by certain States, the prevailing view in the Drafting Committee had been that the text adopted on first reading did not preclude such practice and had the advantage of attaching responsibility for the bag to an easily identifiable person. The Committee had therefore agreed to retain that text, subject to a minor change consisting in the deletion of the words "of the sending State or of a mission, consular post or delegation of that State" at the end of paragraph 1, which were redundant in view of the scope of the draft articles as defined in article 1.

63. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 23.

Article 23 was adopted.

ARTICLE 24 (Identification of the diplomatic bag)

64. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 24, which read:

PART III

STATUS OF THE DIPLOMATIC BAG

Article 24. Identification of the diplomatic bag

1. The packages constituting the diplomatic bag shall bear visible external marks of their character.

2. The packages constituting the diplomatic bag, if not accompanied by a diplomatic courier, shall also bear visible indications of their destination and consignee.

65. Article 24 was the first of the six articles of part III of the draft, on the status of the diplomatic bag. The article was clear and simple and had attracted no comments by Governments. The Drafting Committee had adopted it with only one minor drafting change in paragraph 2, where the words "bear a visible indication" had been replaced by "bear visible indications", thus bringing the text into line with paragraph 1.

66. Mr. McCAFFREY said that he wished to reiterate the comment he had already made in connection with part II of the draft. He believed that the positions of parts II and III should be reversed, since the main point at issue in the draft as a whole was the diplomatic bag, rather than the diplomatic courier.

67. Mr. TOMUSCHAT, recalling the discussion which had taken place on the subject of the definition of the expression "diplomatic bag" in article 3 (see 2128th meeting, paras. 37 *et seq.*), said that, by stipulating that the diplomatic bag had to bear visible external marks of its character, article 24 seemed to imply that, even without such marks, the bag was none the less a diplomatic bag. He therefore welcomed the article, which proved his own view to be correct.

68. Mr. KOROMA said that, since the packages constituting the diplomatic bag were contained inside the bag, it would be necessary to open the bag in order to verify whether the packages bore visible external marks of their character. In his opinion, article 24 failed to convey the meaning intended.

69. Mr. BENNOUNA proposed that paragraph 1 should read: "The diplomatic bag shall bear visible external marks of its character", and that paragraph 2 should read: "The diplomatic bag, if not accompanied by a diplomatic courier, shall also bear visible indications of its destination and consignee."

70. Mr. YANKOV (Special Rapporteur) said that the practical implications of article 24 were fully explained in the commentary to the article as adopted on first reading,[7] as well as in the commentary to the draft articles on diplomatic intercourse and immunities adopted by the Commission in 1958,[8] which had been the basis for the 1961 Vienna Convention on Diplomatic Relations. As to the point raised by Mr. McCaffrey, the present sequence of articles reflected the order adopted in the title of the topic and approved in the relevant General Assembly resolutions. Actually, no legal significance attached to the structure of an instrument; the *sedes materiae* of a treaty was often to be found in the treaty's fourth chapter. What mattered was the legal content, not the order of the chapters.

71. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 24 as proposed by the Drafting Committee.

Article 24 was adopted.

ARTICLE 25 (Contents of the diplomatic bag)

72. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 25, which read:

Article 25. Contents of the diplomatic bag

1. The diplomatic bag may contain only official correspondence, and documents or articles intended exclusively for official use.

2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1.

73. Article 25 had been discussed extensively on first reading. The formulation seemed acceptable to all members, and the Drafting Committee recommended no changes other than to place the word "Content", in the title, in the plural.

74. Mr. AL-BAHARNA said that the wording of paragraph 1, where it was stated that the diplomatic bag "may contain only" official correspondence, was not strong enough. The phrase "shall contain only" would be more appropriate, particularly as the stringency of the term "only" seemed entirely at variance with the permissiveness implied by the word "may".

75. Mr. YANKOV (Special Rapporteur) said that the term "may" was intended to indicate that, whatever the correspondence, documents or articles in the diplomatic bag, they must in all instances be intended exclusively for official use.

76. Mr. MAHIOU pointed out that the formulation had been taken from, *inter alia*, the 1961 Vienna Convention on Diplomatic Relations.

77. Mr. McCAFFREY said that, in contexts such as that of article 25, paragraph 1, the term "may" could be used in contradistinction to "can". The term "can" referred to that which was in fact possible, whereas "may" covered

[7] *Ibid.*, pp. 47-48.

[8] *Yearbook . . . 1958*, vol. II, pp. 89 *et seq.*, document A/3859, chap. III.

that which was permissible. In the present instance, the meaning was that the diplomatic bag was permitted to contain a number of different articles.

78. Mr. BEESLEY confirmed the interpretation of the word "may". In its present usage, it was intended to prevent a personal letter, for example, from being placed in a diplomatic bag and thereby voiding the bag's diplomatic status.

79. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 25 as proposed by the Drafting Committee.

Article 25 was adopted.

ARTICLE 26 (Transmission of the diplomatic bag by postal service or any mode of transport)

80. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 26, which read:

Article 26. Transmission of the diplomatic bag by postal service or any mode of transport

The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag in such a manner as to ensure the best possible facilities for the dispatch of the bag.

81. Article 26 recognized the fact that, when the diplomatic bag was transmitted by a particular mode of transport, the international or national rules regulating that mode of transport applied to the transmission of the bag. That was particularly the case with the postal service. The question had been extensively discussed in the Commission. At one point the provision had been far more detailed, but the Commission had come to the conclusion that any specific rules set out in the draft articles could not apply without a change in the general rules governing the relevant modes of transport. It had not seemed possible to modify such rules—particularly the rules of UPU—to make the diplomatic bag a special category. The text of article 26 adopted on first reading had therefore been confined to recognition that the transmission of the diplomatic bag by postal service or any mode of transport would be subject to the conditions governing the use of such service or mode of transport, as set out in international and national rules. Many members of the Commission had expressed the opinion, however, that the article should at least give an indication that the diplomatic bag was to receive the best treatment possible under the rules. To that effect, the Special Rapporteur had proposed an additional phrase for inclusion at the end of the article, reading "under the best possible conditions". Accepting that approach, and elaborating on the suggestion of the Special Rapporteur, the Drafting Committee recommended that the words "in such a manner as to ensure the best possible facilities for the dispatch of the bag" be added at the end of article 26.

82. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 26.

Article 26 was adopted.

ARTICLE 27 (Safe and rapid dispatch of the diplomatic bag)

83. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 27, which read:

Article 27. Safe and rapid dispatch of the diplomatic bag

The receiving State or the transit State shall facilitate the safe and rapid dispatch of the diplomatic bag and shall, in particular, ensure that such dispatch is not unduly delayed or impeded by formal or technical requirements.

84. After having considered longer and more detailed proposals, the Commission had on first reading adopted a very short text for article 27, on the assumption that all that was necessary was to set out for the receiving State and the transit State, in general terms, the obligation to "provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag". The Drafting Committee had considered that it should not depart from that line, and had concentrated its efforts on drafting changes that could bring out the purposes of the provision more clearly.

85. The changes proposed were the following: instead of saying that the receiving or transit State should "provide the facilities necessary for", the article should stipulate that such a State should "facilitate" the safe and rapid transmission or delivery of the bag. Since the obligation was of a general nature, the Drafting Committee believed that the term "facilitate" was a better way of expressing it than the formula "providing the necessary facilities", which might be interpreted as imposing an excessive burden on the receiving or transit State. The qualification "safe and rapid" had been retained, but instead of applying to the "transmission or delivery" of the bag, it would refer to the "dispatch" of the bag. The Committee had felt that "dispatch"—one single word—encompassed the complex of steps that took place between the arrival of the bag and its delivery to the consignee in the case of the receiving State, or between its arrival and departure in the case of a transit State.

86. The Drafting Committee had come to the conclusion that, although the criterion of the brevity of the article was to be maintained, it would be useful to refer to at least one of the modalities through which the obligation to facilitate the safe and rapid dispatch of the bag should be implemented. It therefore recommended adding the following phrase: "and shall, in particular, ensure that such dispatch is not unduly delayed or impeded by formal or technical requirements". That addition would make it clear that the general obligation of the receiving or transit State implied a more specific obligation not to apply to the bag formal or technical requirements that might unduly delay or impede its safe and rapid dispatch.

87. The Drafting Committee also recommended a new title for the article—"Safe and rapid dispatch of the diplomatic bag"—which indicated the article's content better than the previous title, "Facilities accorded to the diplomatic bag".

88. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 27.

Article 27 was adopted.

ARTICLE 28 (Protection of the diplomatic bag)

89. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 28, which read:

Article 28. Protection of the diplomatic bag

1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination directly or through electronic or other technical devices.

2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the consular bag contains something other than the correspondence, and documents or articles, referred to in article 25, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

90. Article 28 had given rise to differing views which had been difficult to reconcile, as was evidenced by the fact that the text adopted on first reading contained several parts in square brackets. In order to facilitate a solution, the Special Rapporteur had, in his eighth report (A/CN.4/417, paras. 244 *et seq.*), proposed three alternatives, based on the written comments and observations of Governments.

91. For paragraph 1, all three alternatives suggested the same solution, namely deletion of the square brackets around words aimed at expressing two concepts: that the diplomatic bag must be inviolable, wherever it might be; and that the bag must be exempt from examination directly or through electronic or other technical devices. In both cases, the opinions of Governments concorded with the views expressed by the majority of the members of the Commission during the discussion of the article on first reading: the bag should be declared inviolable and should not be subject to examination, either directly or through electronic or other technical devices. The Drafting Committee had therefore decided to recommend acceptance of the proposal by the Special Rapporteur to delete the square brackets in paragraph 1.

92. As to paragraph 2, the choice had been more difficult. The 1963 Vienna Convention on Consular Relations contained a provision—article 35, paragraph 3—which allowed the receiving State to request that the bag be opened when it had serious reason to believe that the bag contained something other than the permitted items. If the request was refused, the bag had to be returned to the State of origin. Such a provision did not appear in the other codification conventions. The three alternatives suggested by the Special Rapporteur for paragraph 2 reflected the three existing possibilities. The first possibility was to delete the paragraph, thus eliminating the special treatment applied to the consular bag. That would have the advantage of establishing a uniform régime covering all bags, but it would be a departure—for the consular bag—from the 1963 Vienna Convention. The second possibility was to retain the paragraph, yet limit its application to the consular bag. That would not go against the 1963 Vienna Convention, but the provision would represent a departure from one of the purposes of the present articles, namely the establishment of a uniform régime for all bags. The third possibility was to extend to all bags the treatment now applied to the consular bag. That would maintain a uniformity of régime, but would be a departure from existing conventions, particularly the 1961 Vienna Convention on Diplomatic Relations.

93. In the Drafting Committee, some members had been in favour of the first alternative: doing away with the possibility of requesting the opening and return of a bag. That possibility, they had argued, was contrary to the principle of the inviolability of the bag and in fact authorized the creation of a significant obstacle to the freedom of official communications. Other members had favoured the third alternative: the possibility of requesting, under special circumstances, the opening of any bag and of having it returned if the request was not accepted. They had maintained that the inviolability of the bag would not be affected, because the bag would be opened only if the sending State agreed. Furthermore, it was impossible to ignore complaints of abuse of the diplomatic bag: the 1987 International Conference on Drug Abuse and Illicit Trafficking had specifically drawn the Commission's attention to the possible misuse of the diplomatic bag for the purpose of drug trafficking.[9]

94. The two viewpoints had seemed impossible to reconcile, and the Drafting Committee had concluded that the second alternative—retaining for the consular bag alone the possibility of requesting its opening, and of returning it if the request was refused—was the only one that could command general acceptance. Paragraph 2 as proposed by the Drafting Committee was therefore basically a reproduction of article 35, paragraph 3, of the 1963 Vienna Convention, but one in which the transit State was granted the same rights formerly accorded only to the receiving State. That extension had already been contemplated in the text adopted on first reading.

95. Mr. KOROMA suggested that, in the interests of concordance with other articles, the title of article 28 might be amended to read "Inviolability of the diplomatic bag".

96. Mr. OGISO said that there were circumstances in which an examination by electronic or other technical devices—one conducted by mutual agreement between the sending State and the receiving State when there was serious reason to suspect that the diplomatic bag had been tampered with—could indeed prevent dangerous articles from being brought into a country in the diplomatic bag. It was therefore desirable for the words "directly or through electronic or other technical devices" to be deleted from paragraph 1. Article 28 would thus be more flexible and the possibility of preventing abuses of the diplomatic bag would be improved. Although that point had been extensively debated, it had not been accepted by a majority, either in the Commission or in the Drafting Committee. He did not intend to reopen the debate at the present stage, but he did wish to re-emphasize the point.

97. Mr. FRANCIS said that, if he had been a member of the Drafting Committee, he would have raised two points during its discussion of paragraph 2. Since the reference in paragraph 1 to the "diplomatic bag" was intended to cover the consular bag as well, he did not understand why paragraph 2 mentioned the "consular", rather than the "diplomatic", bag. He would also prefer the use of the indefinite article "a", rather than "the", before the words "consular bag".

98. Mr. AL-KHASAWNEH recalled that, during the Drafting Committee's discussion of article 28, he had

[9] See *Yearbook . . . 1988*, vol. II (Part Two), p. 91, para. 437.

proposed that, when a sending State complied with a request by a receiving or transit State and a bag was opened, only to show that the suspicions of the receiving or transit State had been unfounded, the receiving or transit State should provide some sort of compensation to the sending State. A better balance would thus be struck between the interests of the receiving or transit State, on the one hand, and those of the sending State, on the other, and such a measure might also help to prevent abuses.

99. He had accordingly proposed that a third paragraph be inserted, reading:

> "3. If, in the situations referred to in paragraph 2, the representative of the sending State complies with the request but the suspicions of the receiving or transit State nevertheless prove unfounded, the receiving or transit State shall make proper amends."

That form of language drew on provisions in the 1958 multilateral conventions on the law of the sea and in the 1982 United Nations Convention on the Law of the Sea, whereby a State had the right to board a ship if it suspected that the ship was involved in drug trafficking; if the suspicions proved unfounded, however, the State must provide compensation. The situation was analogous to the one covered in draft article 28. If consent had been given for the search, the receiving or transit State was not violating any rules, and liability—not responsibility—was involved. The proposal for an additional paragraph had originally been made in the Sixth Committee of the General Assembly by the representative of the Philippines, in 1986.

100. Mr. TOMUSCHAT said that he did not find the régime established under article 28 at all satisfactory. He would have preferred a unitary régime for all kinds of bags, yet now there were two, one for the diplomatic bag and one for the consular bag. The provisions of paragraph 2, which applied only to the consular bag, should have been extended to the diplomatic bag. A comparison of draft article 28 with article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations revealed that it provided more protection, but did not give the receiving or transit State any additional mechanisms for verification if it had good reason for suspicion. Finally, article 28 must not constitute an obstacle to routine security checks at airports.

101. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), replying to the point raised by Mr. Koroma, said that, although inviolability could be said to characterize the diplomatic bag, he would prefer the title "Protection of the diplomatic bag" to "Inviolability of the diplomatic bag" as it was broader and would therefore cover any request for a bag to be opened, as well as the conditions under which such opening took place. The title of an article was, moreover, merely an indication of its content and had no legal effect. He therefore hoped that Mr. Koroma could accept the title of article 28 as it stood.

102. He was unable to accept Mr. Francis's first point, for, if the reference in paragraph 2 to the consular bag were eliminated, it would be tantamount to accepting the broader formula which Mr. Tomuschat and certain other members preferred, but on which a consensus had not been reached in the Drafting Committee. He did not think it would make much difference whether the expression "consular bag" was preceded by a definite or an indefinite article, but possibly one of the English-speaking members of the Commission might wish to offer an opinion on the matter.

103. As to Mr. Al-Khasawneh's proposal for a third paragraph (para. 99 above), the Drafting Committee had endeavoured, in paragraph 2, to follow the 1963 Vienna Convention on Consular Relations as closely as possible and had therefore made no changes or additions. Mr. Al-Khasawneh's suggestion could perhaps have been adopted had it been decided to apply the same system to all bags, but he did not think that it could be incorporated into the existing text of article 28.

104. Mr. ARANGIO-RUIZ said that he shared the concern expressed by Mr. Ogiso and Mr. Tomuschat. He also believed that Mr. Al-Khasawneh had made a wise suggestion.

105. Mr. FRANCIS said that, as he understood it, "the" consular bag would refer to a specific consular bag, for example one sent from Jamaica to London, whereas "a" consular bag could mean any bag. If members wished the text of paragraph 2 to stand, however, he would not press the point.

106. Agreeing with Mr. Tomuschat's remarks, he said that paragraph 2 was very unsatisfactory and called for thorough consideration. Referring to the consular bag alone simply meant shifting the possibility of abuse of the consular bag to the diplomatic bag. He had in mind in particular the drug problem. Was the diplomatic bag to be regarded as sacrosanct even when it was used to carry articles prohibited by law?

107. Mr. RAZAFINDRALAMBO said that the whole system should be aligned with the procedure for inspection of the consular bag.

108. Mr. SOLARI TUDELA said that the safeguard enjoyed by States under paragraph 2 with respect to the consular bag should be extended to the diplomatic bag. He would therefore have preferred not to include the word "consular" in that paragraph, so that the provision would cover both types of bag.

109. Mr. ROUCOUNAS said that his concern with respect to paragraph 2 was that it gave express recognition to the fact that the procedure it laid down would apply only to the consular bag, whereas in the practice of States that procedure also applied in the case of diplomatic bags. Incorporating paragraph 2 in article 28 would therefore certainly not prevent application of the procedure in question to the diplomatic bag as well.

110. Mr. BARSEGOV said that there was a tradition whereby members who participated in the Drafting Committee considered themselves to some extent bound by the decisions it adopted. For his own part, he had adhered to that principle, yielding many of his views in the interests of compromise. It was surprising, therefore, to find that several of those who had spoken in the present discussion—some against the text adopted by the Drafting Committee—were in fact members of that Committee. He wondered whether that might not entail changes in the Commission's methods of work at some point in the future—something which he would not like to happen.

111. Article 28 was a key provision which it had been no simple matter to achieve. Personally, he favoured unifying the legal régimes governing the diplomatic bag and the consular bag—though, of course, giving the consular bag the status of the diplomatic bag and not vice versa. He was prepared to agree that the Commission could confine itself to paragraph 1, deleting paragraph 2. However, the proposal to extend the effects of paragraph 2 to paragraph 1 was totally unacceptable to him, for a number of reasons. In the first place, it would not be consonant with the opinion of the overwhelming majority of members of the Commission and of the Governments which had expressed their views on the matter—and which could not be overlooked. Secondly, it would involve a change in a convention in force and, as jurists, the members of the Commission must know that a convention could, of course, be amended only by the parties to it. Lastly, paragraphs 1 and 2 were quite clear in their terms and it would be wrong to vest them with an arbitrary interpretation that did not follow from those terms.

112. Mr. AL-BAHARNA said that, while he considered that the régime provided for under paragraph 2 should apply also to paragraph 1, he too, as a member of the Drafting Committee, felt bound to accept article 28 as currently drafted, particularly as it had received a broad measure of support.

113. Mr. FRANCIS reiterated that his prime concern was with the drug problem. It behoved the Commission to face up to that problem resolutely.

114. Mr. KOROMA said that all members of the Commission would undoubtedly be at one with Mr. Francis about the need to ensure that the diplomatic bag was not used by drug traffickers. Article 28, however, represented a compromise and should be accepted in that spirit. There was, moreover, an added safeguard in article 25, paragraph 2, which called upon States to "take appropriate measures to prevent the dispatch through its diplomatic bag of articles"—including drugs—"other than those referred to in paragraph 1". In any event, he did not think it could be said that the bulk of drug trafficking was done through the diplomatic bag.

115. Mr. YANKOV (Special Rapporteur) said that, while Mr. Ogiso's point could be mentioned in the commentary, it should be noted that States were free, under bilateral arrangements and in accordance with the principles of equity and reciprocity, to introduce whatever régime they wished. At the same time, most Governments which had expressed their views on the matter had been in favour of the virtually absolute inviolability of the diplomatic bag.

116. If an indefinite article were placed before the words "consular bag" in paragraph 2, as suggested by Mr. Francis, it would convey the idea that any consular bag could be opened automatically rather than, as he would suggest, simply those bags that came under suspicion.

117. With regard to Mr. Francis's other, and more important, point, he had examined the records and documents of the 1987 International Conference on Drug Abuse and Illicit Trafficking and had found no recommendation addressed to the United Nations apart from the one in paragraph 248 of the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control adopted by the Conference, in which it had drawn the Commission's attention to "possible misuse of the diplomatic bag for illicit drug trafficking, so that the Commission could study the matter under the topic relating to the status of the diplomatic bag".[10] The Conference had also adopted a Declaration requesting the Secretary-General of the United Nations to keep under constant review the activities referred to in the Declaration and in the Comprehensive Multidisciplinary Outline.[11] In paragraph 8 of General Assembly resolution 42/112 of 7 December 1987 on the International Conference on Drug Abuse and Illicit Trafficking, the Secretary-General had been requested to report to the Assembly at its forty-third session on the implementation of that resolution.

118. Although there were good reasons for pursuing the point raised by Mr. Al-Khasawneh, it was necessary to be very careful. Only if the bag was unduly delayed or some other damage occurred did the question of responsibility arise. In that connection, he would refer members to article 235 of the 1982 United Nations Convention on the Law of the Sea, concerning protection of the marine environment, under the terms of which no responsibility was incurred in respect of the exercise of a legitimate right, and also to article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, whereby it was legitimate to request that the bag be opened and for it to be returned in the event of refusal. If the Commission could reach agreement along those lines, the point could be elaborated on in the commentary.

119. Mr. EIRIKSSON recalled that, at the previous session, he had proposed an amended text for paragraph 1 of article 28.[12] It had not, however, been accepted.

120. As a drafting matter, the formula "correspondence, and documents or articles, referred to in article 25", in the English and French texts of paragraph 2, should be brought into line with the corresponding provision of the 1963 Vienna Convention on Consular Relations. Only the Spanish text conformed entirely in that respect to that Convention.

121. Mr. YANKOV (Special Rapporteur) informed the Commission that that question had been discussed on first reading and, although the text before the Commission did not conform strictly to the 1963 Vienna Convention, it was an improvement.

122. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 28 as proposed by the Drafting Committee.

Article 28 was adopted.

123. Mr. FRANCIS said that he wished to enter a reservation with respect to paragraph 2 of article 28. Indeed, had he been apprised earlier of the facts to which the Special Rapporteur had referred, he would have taken an even firmer line and would possibly have proposed an amendment. His main concern, of course, was to broaden the application of paragraph 2 to cover diplomatic bags in general.

The meeting rose at 1 p.m.

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[10] *Ibid.*

[11] *Ibid.*, para. 438.

[12] *Ibid.*, pp. 92-93, para. 448.

2131st MEETING

Wednesday, 5 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/409 and Add.1-5,[1] A/CN.4/417,[2] A/CN.4/420,[3] A/CN.4/L.431, sect. E, A/CN.4/L.432, ILC(XLI)/Conf.Room Doc.1)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING[4] (*continued*)

ARTICLE 28 (Protection of the diplomatic bag)[5] (*concluded*)

1. Mr. OGISO said that, although he realized that the Commission had adopted article 28 at the previous meeting, he wished to come back to it to recall that he had expressed a reservation on the text because of the retention, at the end of paragraph 1, of the words "directly or through electronic or other technical devices", whose deletion he had proposed. In the explanation he had given, the Special Rapporteur had indicated that article 6 (Non-discrimination and reciprocity) would enable States to agree on various procedures and, in particular, procedures which could have the same effect as the deletion of the words in question. He assumed that the Special Rapporteur had been referring to article 6, paragraph 2 (*b*), which he himself interpreted—perhaps wrongly—to mean that a State could, by custom or agreement, extend to another State more favourable treatment, but not more restrictive treatment. In that connection, he would welcome clarifications on two points.

2. In the first place, if State A proposed to State B a procedure which allowed the examination of the diplomatic bag through electronic or other technical devices, could that be interpreted as more favourable treatment for State A? Even if the answer was affirmative, such treatment might not be more favourable for State B, with the result that article 6, paragraph 2 (*b*), which authorized only more favourable treatment, would not apply. Secondly, he was also not certain that paragraph 2 (*b*) could apply in cases where two States decided by mutual agreement not to apply certain provisions or, as in the present case, decided by custom or agreement to conduct an examination of their respective diplomatic bags through electronic or other technical devices. It was his understanding that article 6 was based on article 47 of the 1961 Vienna Convention on Diplomatic Relations and, in that connection, he quoted paragraphs (3) and (4) of the commentary to the corresponding provision (then article 44 on non-discrimination) in the draft articles on diplomatic intercourse and immunities adopted by the Commission at its tenth session, in 1958, which had been the basis for that Convention.[6] As he saw it, the application of the rule of reciprocity basically and primarily meant complying with the provision in question itself. Moreover, article 47 of the 1961 Vienna Convention lent itself to several different interpretations, but the most generally accepted one was that more favourable treatment could be extended by agreement, or more restrictive treatment on the basis of reciprocity. That general interpretation was also valid for article 6 of the present draft. The explanations which the Special Rapporteur had given at the previous meeting with regard to article 28 were much more liberal than he had expected.

3. Mr. YANKOV (Special Rapporteur) thanked Mr. Ogiso for giving him a further opportunity to explain the interaction between the principles of non-discrimination and reciprocity, on the one hand, and the various obligations provided for in the draft articles, on the other. The principle of reciprocity operated in two ways: either in a restrictive manner, in the interpretation and application of provisions; or in a positive manner, when the States concerned decided by agreement to extend to each other more favourable treatment. For example, the wealth of State practice in respect of consular relations showed that the régime applied to the consular bag was not that of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, but that of article 27 of the 1961 Vienna Convention on Diplomatic Relations, as a result of which the consular bag enjoyed absolute inviolability, in other words more favourable treatment than that provided for in the 1963 Vienna Convention. That confirmed that States were free, by agreement and on the basis of reciprocity, to adopt the régime they wished rather than the one provided for.

4. It was true that article 6, paragraph 2 (*a*) and (*b*), enabled States to apply to each other a régime that was either more restrictive or more favourable than the one provided for in the draft articles, and that exempting the diplomatic bag from any examination through electronic or other technical devices would mean extending more favourable treatment than if the bag were subject to such an examination. States could, however, either explicitly by agreement or implicitly by custom, exempt each other from that type of examination—even though that was precisely the general rule stated in article 28, paragraph 1, for normal situations. In that sense, he did not see any contradiction between the provisions of article 47 of the 1961 Vienna Convention or the corresponding provisions of the 1963 Vienna Convention and, for example, the practice of States which extended to the consular bag more favourable treatment than that provided for in the 1963 Convention.

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

[2] *Ibid.*

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

[4] The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook . . . 1986*, vol. II (Part Two), pp. 24 *et seq.* For the commentaries, *ibid.*, p. 24, footnote 72.

[5] For the text, see 2130th meeting, para. 89.

[6] See *Yearbook . . . 1958*, vol. II, p. 105, document A/3859, chap. III.

5. Conversely, the treatment extended could be more restrictive and State practice also showed that the diplomatic bag was sometimes made subject by agreement to the régime of the consular bag provided for in article 35, paragraph 3, of the 1963 Vienna Convention.

6. In either case, the Commission had to take account of the way in which States interpreted the principle of reciprocity in relation to the provisions of the existing instruments.

ARTICLE 29 (Exemption from customs duties and taxes)

7. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 29, which read:

Article 29. Exemption from customs duties and taxes

The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit and departure of the diplomatic bag and grant exemption from customs duties, taxes and related charges other than charges for storage, cartage and similar services rendered.

8. The Drafting Committee had made only one substantial change to the text adopted on first reading: it had deleted the reference to "all national, regional or municipal dues and taxes", in order to make it clear that the exemption related only to the duties, taxes and charges which could be applied to the diplomatic bag on its entry into the country. The Committee had also amended the English text in order to indicate clearly that permission for the entry, transit and departure of the bag, as well as its exemption from customs duties, taxes and related charges, were subject to the laws and regulations of the receiving State or the transit State.

9. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 29.

Article 29 was adopted.

ARTICLE 30 (Protective measures in case of *force majeure* or other exceptional circumstances)

10. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 30, which read:

PART IV

MISCELLANEOUS PROVISIONS

Article 30. Protective measures in case of* force majeure *or other exceptional circumstances

1. Where, because of *force majeure* or other exceptional circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the diplomatic bag has been entrusted, or any other member of the crew, is no longer able to maintain custody of the bag, the receiving State or the transit State shall inform the sending State of the situation and take appropriate measures with a view to ensuring the integrity and safety of the bag until the authorities of the sending State recover possession of it.

2. Where, because of *force majeure* or other exceptional circumstances, the diplomatic courier or the unaccompanied diplomatic bag is present in the territory of a State not initially foreseen as a transit State, that State, where aware of the situation, shall accord to the courier and the bag the protection provided for under the present articles and, in particular, extend facilities for their prompt and safe departure from its territory.

11. *Force majeure* or other exceptional circumstances could give rise to two situations in which the diplomatic bag, or the courier and the bag, would need special protection. The first situation, which was dealt with in paragraph 1, was that in which the courier, or the captain of a ship or aircraft in commercial service entrusted with the bag, was no longer able to maintain custody of the bag and left it unprotected. It should be noted that, in order not to impose unnecessary obligations on the receiving or transit State, paragraph 1 specified that the bag was not considered to be unprotected if a member of the crew of the ship or aircraft could take custody of it. The receiving State or the transit State then had two obligations: (i) to inform the sending State of the situation; (ii) to take appropriate measures with a view to ensuring the integrity and safety of the bag until the authorities of the sending State had recovered possession of it.

12. Primarily for the sake of clarity, the Drafting Committee had introduced a few changes in the wording of those two obligations. First, instead of saying that the receiving State or the transit State "shall take appropriate measures to inform the sending State", the article now specified that it "shall inform the sending State of the situation". The words "take appropriate measures" had been considered unnecessary. Secondly, the words "to ensure" had been replaced by "with a view to ensuring", in order to indicate that the obligation of the receiving or transit State to ensure the integrity and safety of the bag was somewhat flexible, since, in that type of situation, it was possible that the receiving or transit State might not be in a position to fulfil that obligation. Thirdly, the words "take repossession" had been replaced by "recover possession". Fourthly, the words "as the case may be" had been deleted, as had been done elsewhere.

13. The second situation, which was dealt with in paragraph 2, was that in which the courier and the bag, or the unaccompanied bag, were present in the territory of a State not initially foreseen as a transit State. In such a case, the State concerned, when aware of that situation, was bound to accord to the courier and the bag the protection provided for in the present articles and, in particular, extend to them facilities for their prompt and safe departure from its territory.

14. Again with a view to clarity, the Drafting Committee had made a few changes in the text adopted on first reading. First, the new text referred to "other exceptional circumstances" in addition to cases of *force majeure*, as in paragraph 1. Secondly, the words "the diplomatic courier or the diplomatic bag" had been replaced by "the diplomatic courier or the unaccompanied diplomatic bag". Thirdly, the Committee had decided to indicate expressly that the obligations of a State would arise only "where" that State was "aware of the situation". Fourthly, it had given the content of the obligations of the State concerned greater precision by adding the words "provided for under the present articles" after the word "protection" and by replacing the words "and shall extend to them the facilities necessary to allow them to leave the territory" by the words "and, in particular, extend facilities for their prompt and safe departure from its territory".

15. Lastly, in paragraph 1 of the Spanish text, the words *al que se haya confiado* had been replaced by *a quien se haya confiado* and the words *vuelvan a tomar posesión de ella* had been replaced by *la recuperen*.

16. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 30.

Article 30 was adopted.

ARTICLE 31 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

17. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 31, which read:

Article 31. Non-recognition of States or Governments or absence of diplomatic or consular relations

The State on whose territory an international organization has its seat or an office or a meeting of an international organ or a conference is held shall grant the facilities, privileges and immunities accorded under the present articles to the diplomatic courier and the diplomatic bag of a sending State directed to or from its mission or delegation, notwithstanding the non-recognition of one of those States or its Government by the other State or the non-existence of diplomatic or consular relations between them.

18. The fact that two States did not recognize each other or did not maintain diplomatic or consular relations did not prevent one of them from having a mission or delegation in the territory of the other if an international organization had its seat or an office in that territory or if a conference was held there. In that case, the sending State-receiving State relationship provided for in the present articles would apply.

19. The Drafting Committee believed that the wording now proposed for article 31 made the intention of its provisions clear. The articles could no longer be interpreted as meaning that two States had to apply the present articles even if they did not recognize each other or did not maintain diplomatic or consular relations—an interpretation which, though illogical, had nevertheless been possible. The text now clearly indicated that that situation of non-recognition or absence of relations did not exempt a State in whose territory an international organization had its seat or an office or in whose territory an international conference was held from having the obligation to act as a receiving State towards any State which had a mission to the organization or sent a delegation to the conference. However, that obligation concerned only couriers and bags exchanged between the sending State and its mission or delegation. That point was made clear by the words "the diplomatic courier and the diplomatic bag of a sending State directed to or from its mission or delegation".

20. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 31.

Article 31 was adopted.

ARTICLE 32 (Relationship between the present articles and other agreements and conventions)

21. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 32, which read:

Article 32. Relationship between the present articles and other agreements and conventions

1. The present articles shall, as between Parties to them and to the conventions listed in subparagraphs (1) and (2) of paragraph 1 of article 3, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in those conventions.

2. The provisions of the present articles are without prejudice to other international agreements in force as between parties to them.

3. Nothing in the present articles shall preclude Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such agreements do not result in discrimination within the meaning of article 6.

22. The text adopted on first reading had been considered by a number of Governments to call for further clarification and a revised text submitted by the Special Rapporteur at the previous session had not been considered fully satisfactory by members of the Commission. The Drafting Committee had deemed it advisable to go further in developing the approach taken by the Special Rapporteur in his eighth report (see A/CN.4/417, para. 274) and had accordingly agreed to deal in three separate paragraphs with three categories of agreements, namely: (i) the conventions on diplomatic and consular law referred to in article 3 of the draft; (ii) other international agreements on the same subject in force as between the parties; (iii) agreements which might be concluded in the future.

23. Paragraph 1 dealt with the relationship between the present articles and the codification conventions referred to in article 3. The word "supplement" indicated that the draft articles elaborated on the provisions of those conventions and did not purport to amend them, since only the States parties to the conventions in question could do that. That point would be developed in the commentary. In order to bring it out as clearly as possible in the text of the article, the Drafting Committee had decided to refer to "the rules . . . contained" in the three conventions rather than to the provisions of those conventions. The Committee had furthermore inserted the words "as between Parties to them and to the conventions listed in subparagraphs (1) and (2) of paragraph 1 of article 3" in order to make it clear that the supplementary nature attributed to the articles applied only when the States concerned were parties to the conventions listed in article 3.

24. Paragraph 2 reproduced the text of article 73, paragraph 1, of the 1963 Vienna Convention on Consular Relations, except that, following the model of article 4 of the 1975 Vienna Convention on the Representation of States, the words "are without prejudice to" had replaced "shall not affect". In the Drafting Committee's view, the words "are without prejudice to" had the advantage of giving the States parties to agreements other than those referred to in article 3 of the draft some leeway with regard to the effects of the present articles on their mutual relations.

25. Paragraph 3 was modelled on article 4 of the 1975 Vienna Convention and recognized the sovereign right of States to conclude international agreements on the subject-matter of the present articles, provided that such agreements did not result in discrimination within the meaning of article 6.

26. Mr. YANKOV (Special Rapporteur) said he thought that the reference in paragraph 1 should be only to subparagraph (1) of paragraph 1 of article 3. The same conventions were listed in subparagraph (6) of paragraph 1 of that article and that subparagraph would also have to be mentioned if reference were made to subparagraph (2). He therefore proposed that, for the sake of logic and brevity, the reference to subparagraph (2) be deleted.

27. Mr. ILLUECA recalled that, during the debate in the Sixth Committee at the forty-third session of the General Assembly, it had been stated that article 32 was not fully in keeping with the provisions of article 30 of the 1969 Vienna Convention on the Law of Treaties, in particular with regard to the application of the doctrine of *lex posterior* or *lex specialis*. Furthermore, while the word "supplement" could be used to define the relationship between compatible rules, it was not suitable for defining the relationship between rules whose content was different. On the basis of the wording of article 73, paragraph 2, of the 1963 Vienna Convention on Consular Relations and the debate in the Sixth Committee, he proposed that the first part of paragraph 1 of article 32 should be amended to read: "The present articles shall . . . confirm, supplement, extend or amplify . . .". He would also prefer the title of the article to read: "Relationship between the present articles and other international agreements".

28. Mr. EIRIKSSON said that he agreed with the Special Rapporteur's suggestion concerning paragraph 1, but thought that, for the sake of clarity, it would be still better to spell out what conventions were being referred to, using the conjunction "or". The text as it stood might give the impression of referring to States parties to the present articles and to *all* the conventions in question.

29. With regard to substance, he said that article 32 had a very pronounced legal character which called for scrupulously careful drafting. Whatever explanations the commentary might contribute, however, paragraph 1 was not very clear about the relationship between the present articles and the conventions referred to. In particular, it should be noted that, even in the absence of that paragraph, the régime provided for in the present articles would apply to bags of missions of States, whether or not they were parties to the 1975 Vienna Convention on the Representation of States; paragraph 1 merely cast doubt on that point. In fact, unless the Commission's intention was to provide a definitive definition of the legal relationship between the present articles and the conventions in question, paragraph 1 was unnecessary.

30. Referring to paragraph 2, he said that it was superfluous to reproduce the words "in force as between parties to them" from the texts of the conventions on which the draft was modelled; he had never seen the point of those words in those conventions.

31. As to the safeguard clause at the end of paragraph 3, he said that he could not imagine a case in which an agreement might have the result which that clause was designed to prevent. The only possibility was a case where two or three parties to the present articles decided to have an agreement which resulted in a less favourable relationship between them, causing other States to complain, but a relationship freely entered into by States could be of no relevance to third States.

32. Mr. McCAFFREY said he also thought that paragraph 1 was unclear. It had been proposed in the Drafting Committee that the word "supplement" be replaced by the words "shall prevail" if the intention was that, in the event of incompatibility between the present articles and the provisions of the conventions in question, it was the present articles that should prevail. If the opposite was the case, then it had to be stated that the provisions of those conventions would prevail. And if, as had been pointed out in the Drafting Committee, incompatibility between the two sets of provisions was not possible, then paragraph 1 was unnecessary. By implying an addition, the word "supplement" suggested that there might be some incompatibility or inconsistency. However, he would not oppose the adoption of article 32.

33. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that Mr. Eiriksson and Mr. McCaffrey had both participated in the Drafting Committee's work and their views had been taken into consideration. However, the majority of the members of the Committee had decided to retain paragraph 1. The word "supplement" had been discussed at length in the Committee. To add the words "confirm", "extend" and "amplify", as Mr. Illueca had suggested, would be to add a great deal; as it now stood, paragraph 1 meant that, if the articles of the future instrument supplemented the provisions of the conventions in question, they were applicable and that, in the opposite case, they were not.

34. Mr. YANKOV (Special Rapporteur), replying to Mr. Illueca, recalled that article 32 as originally proposed had been modelled on article 73 of the 1963 Vienna Convention on Consular Relations and article 4 (*a*) of the 1975 Vienna Convention on the Representation of States. When the Commission had considered the article on first reading, it had concluded that simpler wording was preferable. He had therefore suggested very simple wording from which the present text derived. From the very outset, the purpose of the draft articles had been precisely to supplement the various codification conventions concerning the diplomatic bag and the diplomatic courier, because those conventions contained some gaps, for example in connection with the unaccompanied bag, the bag forwarded by mail and the status of the courier and the bag.

35. With regard to the word "supplement" in paragraph 1, he said that he had proposed the word "complement", but the Drafting Committee had preferred the word "supplement". He personally was in favour of Mr. McCaffrey's proposal to replace the word "supplement" by the words "shall prevail", because the present articles would, in fact, prevail; there again, however, the Drafting Committee had agreed on the word "supplement".

36. As to Mr. Eiriksson's comment on the safeguard clause in paragraph 3, he could, unlike Mr. Eiriksson, imagine cases where the clause would be of some use. States could, for example, conclude agreements among themselves which would affect transit States. It was, moreover, necessary to place some limits on the discretionary power of States to conclude agreements in the present field, since the practice of States was often innovative.

37. Mr. REUTER said that the problem with article 32 was the same as the one the Commission had encountered when drafting the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations; in other words, it was a matter of "codifying codification". The present text might not be entirely logical in some ways, but it offered definite practical advantages. He fully supported it and stressed that the work done on it by the Special Rapporteur and the Drafting Committee was irreproachable.

38. Referring to Mr. Ogiso's comments on article 6, he said that the point at issue was the meaning of the words "more favourable treatment" in paragraph 2 (*b*) of that

article. Did they mean more favourable to the integrity of the bag or to the fact that it was as it should be? The Special Rapporteur had said that, in some cases, State practice favoured the bag's integrity, by providing for the absolute inviolability of the consular bag, and, in others, emphasized the importance of its being as it should be. The expression "more favourable treatment" used in article 6 was not absolutely explicit in that regard, but that was to be welcomed.

39. Mr. KOROMA said that, if he had been present in the Drafting Committee during the consideration of article 32, he would have argued in favour of the word "complement". The word "supplement" in paragraph 1 suggested that the main substantive rules were to be found in other conventions. In view of the autonomous nature of the present articles, the word "complement" was more correct. Moreover, the French text used the word *complètent* and the Spanish text the word *completarán*.

40. Mr. BENNOUNA recalled that he had already expressed his opinion on article 32 at the previous session. While he did not intend to call in question the compromise solution that had been adopted, he did wish to state his views again.

41. When the General Assembly entrusted a particular topic to the Commission, it simultaneously gave it full competence to codify and possibly develop the law relating to that topic. Some members had said that the Commission could not revise earlier conventions. That view was disputable to say the least. The Commission was, of course, required by its statute to take account of existing law. That did not mean, however, that it was bound by earlier instruments which covered the topic only partially. If it were, the situation would be like the one in which the Commission found itself at present, where the text on which it was working would have to be interpreted in the light of the conventions on diplomatic and consular relations and where it would have to be assumed that there could be no contradiction between the conventions referred to in article 3 of the draft and the draft itself. That was, however, only an assumption and there was no way of showing that it was true. The fact was that the Commission had found it expedient to pass the difficulty on to States themselves and to the third parties which would be called upon to interpret the text—an approach which was probably politically advisable, but which was contrary to the concept of legal rigour. If the point at issue had been simply to supplement the existing conventions, a few additional provisions would have been enough. But that was not the case, since the Commission had started afresh and had tried to draft an exhaustive instrument. The word "supplement" in paragraph 1 of article 32 was therefore inappropriate and would certainly give rise to problems in the future. It would have been better to take account of the time sequence of the various instruments and to rely on the fact that a State was unlikely to invoke an earlier convention in order to challenge the provisions of a more complete and more recent instrument.

42. He was thus prepared to accept article 32 as proposed by the Drafting Committee, because it safeguarded the future of the draft in political terms. He nevertheless maintained the reservations he had on technical points.

43. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) explained that the Drafting Committee had regarded the word "supplement" as the best possible compromise. He nevertheless agreed that there was a terminology problem in the French and Spanish texts, where he was not sure that the words *complètent* and *completarán* expressed the same idea.

44. Replying to Mr. Eiriksson's suggestion that the codification conventions referred to in article 3 should be listed again in article 32, he said that the Drafting Committee had followed the normal practice of using cross-references to other texts.

45. Mr. MAHIOU said that it was because of its flexibility that paragraph 1 would give rise to problems of interpretation. In the event of conflict between the present articles and the existing codification conventions, the solution would be found not in that provision, but, rather, in article 30, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties, which stated the rules governing successive treaties. The technical problem which was worrying Mr. Bennouna was thus not legally insurmountable.

46. Mr. FRANCIS said that paragraph 1 lent itself to a variety of interpretations. Although he was prepared to accept it as proposed by the Drafting Committee, he thought that the Commission should allow itself time for further reflection. It could come back to the issue once it had completed the consideration of the draft as a whole and had a complete overview of the text.

47. Mr. EIRIKSSON said that he found the wording of paragraph 3 awkward because it could be interpreted to mean that no agreement which went beyond the scope of the present articles could be concluded between States. Read in that way, the provision was far too strict. It was possible to imagine a very simple situation which might be regarded as discrimination within the meaning of article 6: State A and State B, both of them parties to the future convention, agreed reciprocally to apply a stricter régime of inspection of the bag than provided for by the convention. As that régime would be less favourable, there would be a breach of paragraph 3 and yet no third State would have reason for complaint. He therefore proposed that further thought be given to the words "provided that such agreements do not result in discrimination within the meaning of article 6", which complicated the situation and which did not, moreover, appear in the corresponding provision of the 1963 Vienna Convention on Consular Relations (art. 73).

48. Mr. ROUCOUNAS said that, when working on a codification convention, it was necessary to determine the relationship between the new instrument and those which were in force or would come into force. Paragraph 1 of article 32, whose purpose was precisely that, was worded in such a way that reference had to be made to article 30, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties. It was true that the Commission had avoided saying that the new text "prevailed" over existing conventions and had preferred to use the term "supplement", which was much more cautious, but the future convention would have a life of its own, independently of the earlier codification conventions, and States would be able to become parties to it without having signed the others. The situation then would be unclear and he would like an explanation of the way in which paragraph 1 should be interpreted in such a case.

49. Paragraph 3 was designed to give some flexibility to the obligations which States would assume by signing the future convention. However, since the paragraph referred to article 6, on non-discrimination, whose content was also to be found in article 47 of the 1961 Vienna Convention on Diplomatic Relations, States parties to that Convention would already have assumed that obligation. As to article 73 of the 1963 Vienna Convention on Consular Relations, its scope was far broader than that of draft article 32, inasmuch as its paragraph 2 stated that "Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof". In the circumstances, it was open to question whether the restriction imposed in draft article 32, paragraph 3, by the reference to article 6 would have any real importance in the future. The restriction was, however, a sensible one and it should not stand in the way of the adoption of article 32 as it now stood. The point at issue was not to prevent States from concluding any agreements they might wish to conclude; the very logic of codification, in which the Commission was engaged at present, called for limits and restrictions.

50. Mr. Sreenivasa RAO said that the problem of compatibility between a text in the process of elaboration and agreements already in force was a constantly recurring one. In the case in point, it arose in simple terms. The purpose of the draft under consideration was to bring together, without mutual contradiction, all existing provisions on the subject of the immunities of the diplomatic courier and the diplomatic bag. The Commission had taken advantage of the present exercise to add some new provisions, and it was those new passages which were additional to the existing conventions and which would "supplement" them, as paragraph 1 of article 32 very aptly stated. However, if two States accepted those new provisions, there would not normally be any problem between them; and third States would not be affected. The problem of non-discrimination could arise only between those two States, namely the States which had accepted the new provisions and, by so doing, had undertaken to abide by them in accordance with article 32.

51. In his view, article 32 was entirely acceptable in its present form.

52. Mr. TOMUSCHAT said that the word "supplement" clearly reflected the general thrust of the draft articles. If there was an inconsistency between the future convention and the instruments listed in article 3, then article 30, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties would apply, as Mr. Mahiou had pointed out.

53. On the other hand, paragraph 3 of draft article 32 seemed to elevate the article to a kind of *jus cogens*. The words "provided that such agreements do not result in discrimination within the meaning of article 6" referred specifically to those situations where discrimination might be allowed, and that was somewhat illogical. He would nevertheless not oppose the adoption of the text proposed by the Drafting Committee.

54. Mr. BEESLEY said that, while not wishing to repeat what had been said, he agreed with Mr. Mahiou and Mr. Tomuschat as to the interaction between the present articles and article 30 of the 1969 Vienna Convention on the Law of Treaties. He also agreed with Mr. Sreenivasa Rao that the present articles were of a supplementary nature. Hence he foresaw difficulties when States realized that, despite the exceptions incorporated in article 6, the supplementary provisions being offered for their signature would prevent them from proceeding as they had formerly done, because they would make their actions discriminatory. In that connection, a reading of articles 17 and 28, in the light of articles 32 and 6, could give an unforeseen impression. Thus there was a cumulative effect in the Commission's work on the present articles such that, at various stages, results had been achieved that were different from those expected, although it was impossible to identify the stage at which the initial intention had been diverted. Article 32, which sought to prevent future signatory States from abusing the régime that was to be set up, might actually open the door to such abuse by jeopardizing the chances of States accepting the draft articles.

55. No one was trying to block the adoption of a text which was the result of arduous negotiations and serious legal drafting efforts, but it remained to be seen how Governments, which were political bodies, would react to the proposed instrument and whether they would let it operate for very long.

56. Mr. ARANGIO-RUIZ said that he, too, was afraid the text proposed by the Drafting Committee might meet with heavy resistance from Governments during the diplomatic conference at which it was to be adopted. In an ideal world, the Commission would have started on the topic with a clean slate and drafted all the relevant rules, instead of trying to supplement existing codification conventions. That was why it was faced with the problem raised by paragraph 1 of article 32.

57. As to paragraph 3, he believed that the situation described by Mr. Eiriksson was entirely hypothetical. In practice, two States could always come to an agreement to give each other treatment different from that provided for by the present articles. Paragraph 3 reflected what might be called the real situation: two States could agree to give the diplomatic courier and the diplomatic bag more favourable treatment than the rules provided for, or even less favourable treatment, if they so wished.

58. Mr. BENNOUNA requested that the commentary to article 32 should explain that consistency between the present articles and the existing codification conventions was assumed, but that, if an inconsistency should develop, the 1969 Vienna Convention on the Law of Treaties would apply.

59. Mr. YANKOV (Special Rapporteur) said that paragraph 3 of article 32 must be read in the light of articles 30 and 41 of the 1969 Vienna Convention on the Law of Treaties. In his fourth report, he had originally proposed an article with much more substance to it, based on article 73 of the 1963 Vienna Convention on Consular Relations.[7] The article had subsequently been shortened to a single sentence, which had read: "The provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them." When adopting that text on first reading, the Commission had incorporated the following explanation in paragraph (5) of the commentary:

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[7] *Yearbook . . . 1983*, vol. II (Part One), p. 134, document A/CN.4/374 and Add.1-4, para. 403.

(5) There was a consensus in the Commission to the effect that the provision in article 6, paragraph 2 (*b*), of the present draft made it possible to dispense with the adoption of an additional paragraph to cover the relationship between the present articles and future agreements relating to the same subject-matter, particularly if account was taken of article 41 of the 1969 Vienna Convention on the Law of Treaties. It should therefore be understood that, in accordance with article 6, paragraph 2 (*b*), nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag, confirming, supplementing, extending or amplifying the provisions thereof, provided that such new provisions are not incompatible with the object and purpose of the present articles and do not affect the enjoyment of the rights or the performance of the obligations of third States.[8]

That explanation had replaced the provision he had originally proposed.

60. He understood the reference to article 6 to mean that the international agreements in question must not defeat the object and purpose of the present articles, taking into account the general rules contained in the 1969 Vienna Convention.

61. The provisions of article 32 left the States concerned free to conclude agreements as long as there was no discrimination within the meaning of article 6 and the agreements did not infringe the rights of third States, which, in some cases, might be transit States.

62. Mr. EIRIKSSON said that he could not accept the solution suggested by Mr. Arangio-Ruiz. He would have preferred article 32 to be drafted on the basis of the wording used in paragraph (5) of the commentary to the article, which the Special Rapporteur had just read out. Such a provision would certainly have received the Commission's endorsement. It was unfortunate that the Commission had begun to consider article 32 only at the current meeting.

63. Mr. BEESLEY said he was not convinced that the text under consideration reflected the Special Rapporteur's position as he had just explained it. He therefore had the same reservations as Mr. Eiriksson concerning article 32.

64. The CHAIRMAN asked whether the Commission would be able to accept the substitution of the text just read out by the Special Rapporteur for the safeguard clause in paragraph 3.

65. Mr. EIRIKSSON said that the Commission could achieve the same result by deleting the safeguard clause from paragraph 3 and including in the commentary to article 32 the explanation that had been incorporated in the commentary to the article when it had been adopted on first reading, namely that States which were bound by the régime of the law of treaties could not conclude agreements that would affect the rights of other States or defeat the object and purpose of the present articles. Such a text would not prevent States which so desired from concluding agreements that instituted less favourable treatment in their mutual relations and third States would then have no reason to object.

66. Mr. YANKOV (Special Rapporteur) explained that he had not been proposing an amendment. He had no objection to the idea of replacing the reference to non-discrimination in paragraph 3 of article 32 by the reproduction in the commentary of the last phrase of the commentary to the article as adopted on first reading in 1986, namely: "provided that such new provisions are not incompatible with the object and purpose of the present articles . . .". He was afraid, however, that the Commission was getting into a debate on substance.

67. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the text of article 32 had in fact been before the members of the Commission for several days. The problem was basically that agreements concluded in the future must not result in discrimination. It was now proposed to replace the wording that expressed that idea by that used at the end of the 1986 commentary. Since it was when the rights of other States were affected that discrimination occurred, however, to state that agreements concluded in the future must not affect the rights of third States amounted to the same thing as saying that there must be no discrimination against third States. And if discrimination was to be mentioned, it should be made clear that it was discrimination "within the meaning of article 6".

68. He was not convinced that it would be appropriate to mention the idea of not defeating the object and purpose of the present articles. Since the object and purpose of the articles was to facilitate communications, it could be assumed that States which concluded additional agreements on the same subject might wish to modify, but not necessarily to defeat, the object and purpose of the articles.

69. In conclusion, he said that he did not oppose the amendment of paragraph 3, although, judging from the intensive work done by the Drafting Committee, he was not sure that the Commission could redraft the paragraph without a lengthy discussion, something which he would advise against. In his opinion, the best approach might be to retain paragraph 3 as it stood and to incorporate in the commentary the additional explanation given by the Special Rapporteur.

70. Mr. EIRIKSSON said that the commentary to the text adopted on first reading would be irrelevant if paragraph 3 were adopted as it now stood: it would be relevant only if the safeguard clause were omitted. Because of the existence of the 1969 Vienna Convention on the Law of Treaties, moreover, the Commission could obtain the same result by deleting paragraph 3.

71. Mr. McCAFFREY said that, while it might be a departure from usual practice, the Commission could consider adopting paragraph 3 in its present form provisionally and inviting further comments on article 32 when it took up the commentary thereto during its consideration of its draft report.

72. Mr. BENNOUNA said he agreed with Mr. Eiriksson that paragraph 3 was unnecessary. Nothing, except the peremptory rules of international law, prevented States from concluding among themselves international agreements that did not infringe the rights of third States. He therefore had some reservations about the idea of restricting the ability of States to enter into agreements by invoking an indefinite rule, namely the principle of non-discrimination, which was indeed referred to, but not defined, in article 6.

73. Mr. YANKOV (Special Rapporteur) said that he had difficulty seeing how article 32 could be adopted provisionally, but it went without saying that members of the Commission were free to express their views on its provisions during the consideration of the commentary. Personally, he thought it would be unfortunate to delete paragraph 3, even though the text was somewhat ambiguous. It

[8] *Yearbook . . . 1986*, vol. II (Part Two), pp. 32-33.

might require further interpretation, but was that not the case with all treaties? Indeed, that was why provisions on the settlement of disputes were so useful.

74. Mr. EIRIKSSON suggested that the Commission resume its consideration of article 32 at its next meeting. The Special Rapporteur might then submit a text in which the safeguard clause was replaced by the relevant part of the commentary to the text adopted on first reading, although he believed that it would be enough to incorporate that language in the new commentary.

75. The CHAIRMAN proposed that the Commission should adopt paragraph 1 of article 32 as amended by the Special Rapporteur (para. 26 above), and paragraph 2 as proposed by the Drafting Committee, and that the consideration of paragraph 3 be deferred until the next meeting to enable members to hold consultations on the text.

It was so agreed.

Paragraphs 1 and 2 of article 32 were adopted.

DRAFT OPTIONAL PROTOCOL ONE ON THE STATUS OF THE COURIER AND THE BAG OF SPECIAL MISSIONS

76. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for draft Optional Protocol One, which read:

DRAFT OPTIONAL PROTOCOL ONE ON THE STATUS OF THE COURIER AND THE BAG OF SPECIAL MISSIONS

The States Parties to the present Protocol and to the articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, hereinafter referred to as "the articles",

Have agreed as follows:

Article I

The articles also apply to a courier and a bag employed for the official communications of a State with its special missions within the meaning of the Convention on Special Missions of 8 December 1969, wherever situated, and for the official communications of those missions with the sending State or with its diplomatic missions, consular posts, delegations or other special missions.

Article II

For the purposes of the articles:

(*a*) "mission" also means a special mission within the meaning of the Convention on Special Missions of 8 December 1969;

(*b*) "diplomatic courier" also means a person duly authorized by the sending State as a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969 who is entrusted with the custody, transportation and delivery of a diplomatic bag and is employed for the official communications referred to in article I;

(*c*) "diplomatic bag" also means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by a courier or not, which are used for the official communications referred to in article I and which bear visible external marks of their character as a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969.

Article III

1. The present Protocol shall, as between Parties to it and to the Convention on Special Missions of 8 December 1969, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in that Convention.

2. The provisions of the present Protocol are without prejudice to other international agreements in force as between parties to them.

3. Nothing in the present Protocol shall preclude Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such agreements do not result in discrimination within the meaning of article 6.

77. As he had explained when introducing article 1, on the scope of the present articles (2128th meeting), the Drafting Committee had decided to recommend, in addition to the deletion of article 33 (Optional declaration), that the courier and the bag of special missions be dealt with, not in the draft articles, but in a separate optional protocol. It was a very simple protocol. Article I defined its object and purpose: the application of the draft articles to the courier and the bag employed for the official communications of a State with its special missions, within the meaning of the 1969 Convention on Special Missions, and for the communications of those missions with the sending State or with other special missions, diplomatic missions, consular posts or delegations of that State.

78. Article II contained definitions supplementing article 3 of the draft articles and was aimed at extending their scope—as between parties to the articles and the protocol—to missions, couriers and bags within the meaning of the 1969 Convention.

79. Article III was based on article 32 of the draft articles and supplemented the rules on the status of the diplomatic courier and the diplomatic bag contained in the 1969 Convention on Special Missions. Paragraphs 2 and 3 established exactly the same relationship between the protocol and present and future agreements as did article 32, paragraphs 2 and 3.

80. The CHAIRMAN suggested that the Commission proceed in the same way for article III as it had for article 32 (see para. 75 above).

81. Mr. EIRIKSSON said that, in order to avoid confusion in the French text between article 1 of the draft articles and article I of the draft optional protocols, the formula *article premier* should be replaced by *article I* in the protocols.

82. He further proposed that the last phrase of article I be amended to read: "or with the other missions of that State, its consular posts or its delegations".

83. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) proposed instead the following wording: "or with its other missions, consular posts or delegations".

84. Mr. ROUCOUNAS said that, since the very reason for the presence of article III in both draft optional protocols was that article 32 of the draft articles did not refer to all the relevant conventions, it might be better to extend the scope of the draft articles in such a way that article 32 would also apply to special missions and international organizations.

85. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, if the provisions of article III were not retained, the applicability of article 32 to the types of couriers and bags to which the protocols referred would be open to question.

86. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article I of draft Optional Protocol One as amended by Mr. Eiriksson and the Chairman of the Drafting

Committee (paras. 81 and 83 above), as well as article II and paragraphs 1 and 2 of article III, and to defer the consideration of paragraph 3 until the next meeting.

It was so agreed.

Articles I and II and paragraphs 1 and 2 of article III of draft Optional Protocol One were adopted.

The meeting rose at 1 p.m.

2132nd MEETING

Thursday, 6 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*concluded*) (A/CN.4/409 and Add.1-5,[1] A/CN.4/417,[2] A/CN.4/420,[3] A/CN.4/L.431, sect. E, A/CN.4/L.432, ILC(XLI)/Conf.Room Doc.1)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING[4] (*concluded*)

ARTICLE 32 (Relationship between the present articles and other agreements and conventions)[5] (*concluded*)

and

DRAFT OPTIONAL PROTOCOL ONE ON THE STATUS OF THE COURIER AND THE BAG OF SPECIAL MISSIONS[6] (*concluded*)

1. The CHAIRMAN recalled that, at the previous meeting, paragraph 3 of article 32 of the draft articles and paragraph 3 of article III of draft Optional Protocol One had been left in abeyance, pending consultations between the Chairman of the Drafting Committee, the Special Rapporteur and members of the Commission (see 2131st meeting, paras. 75 and 86). He invited the Special Rapporteur to report on the outcome of those consultations.

2. Mr. YANKOV (Special Rapporteur) said his own view was that paragraph 3 of article 32 as proposed by the Drafting Committee was satisfactory. He was convinced that the threefold approach adopted in that article was absolutely necessary to provide for the relationship, first, between the draft articles and the codification conventions; secondly, between the draft articles and existing agreements; and, thirdly, between the draft articles and future agreements. In the light of the comments made at the previous meeting, however, he had endeavoured to express those relationships in more explicit terms, on the basis of the form of language used in the 1969 Vienna Convention on the Law of Treaties. He therefore proposed that paragraph 3 of article 32 and, *mutatis mutandis*, paragraph 3 of article III of draft Optional Protocol One should be amended to read:

> "3. Nothing in the present articles shall preclude the Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, confirming, supplementing, extending or amplifying the provisions thereof, provided that such new provisions are not incompatible with the object and purpose of the present articles and do not affect the enjoyment by the other Parties to the present articles of their rights or the performance of their obligations under the present articles."

3. One minor drafting change concerned the title of article 32, which he suggested should be amended to read: "Relationship between the present articles and other conventions and agreements". That would be in line with the general structure of the draft articles.

4. Mr. EIRIKSSON said that the new text was completely in accord with the suggestions he had made at the previous meeting. Since the subject-matter of the draft articles was quite clear, however, he saw no need for the phrase "relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" and would suggest that it be deleted. Such a change would have the added advantage of shortening the text somewhat.

5. Mr. FRANCIS said that he would have preferred the Drafting Committee's original formulation, but with the deletion of any reference to discrimination and with the addition of a provision concerning incompatibility with the draft articles. The new text had, however, been agreed by the persons concerned and took account of all the material elements. He could therefore accept it. Mr. Eiriksson's suggestion none the less merited consideration.

6. Mr. BARBOZA said that the wording of the proposed new text was unduly cumbersome and might have the effect of excluding the possibility of doing anything under the terms of other treaties other than "confirming, supplementing, extending or amplifying the provisions" of the draft articles. That phrase added nothing to paragraph 3, in his view. The main point was that new agreements should not be incompatible with the object and purpose of the draft articles. Accordingly, the phrase "confirming, supplementing, extending or amplifying the provisions thereof" should be deleted and the words "such new provisions" should be replaced by "the provisions of those agreements".

7. Mr. ARANGIO-RUIZ said he considered that paragraph 3 served no useful purpose and was not worth the time and effort being spent on it. In particular, to what were the words "extending or amplifying" meant to apply?

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

[2] *Ibid.*

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

[4] The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook ... 1986*, vol. II (Part Two), pp. 24 *et seq.* For the commentaries, *ibid.*, p. 24, footnote 72.

[5] For the text, see 2131st meeting, para. 21.

[6] For the text, *ibid.*, para. 76.

All treaties embodied provisions—both positive and negative—which could be either extended or restricted, or again, amplified or narrowed. The best course would be to delete any such qualifying phrase and leave it to the parties to do as they wished, under bilateral arrangements, so long as the provisions they adopted were not incompatible with the object and purpose of the draft articles.

8. The expression "new provisions" was also obscure. Why use the term "new"? Such provisions might in fact have existed for years, as for instance when two States had already agreed to follow rules that differed from those of the future convention, yet were compatible with it.

9. Mr. BEESLEY said that he could accept the text proposed by the Special Rapporteur provided that it was amended along the lines suggested by Mr. Barboza and Mr. Arangio-Ruiz. It was preferable to retain the words "relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", and a suitable expression that would refer back to the international agreements mentioned in the first part of the provision should be found to replace the words "such new provisions". He took the point implicit in Mr. Arangio-Ruiz's remarks that an agreement obviously should not be incompatible with the object and purpose of the draft articles. He also considered that the last part of the new text was a more elegant way, from the legal standpoint, of referring to non-discrimination.

10. On a more general question, he would point out that, although it was generally agreed that the object of the draft articles was to facilitate communication among States and other entities by means of the diplomatic bag and the consular bag, whether or not accompanied by a courier, there was some difference of view as to whether the régime should be subjected to further restrictions or be made more liberal. That point did not cause any difficulty, however, for it could be settled as and when a diplomatic conference was convened to adopt the various texts.

11. Mr. YANKOV (Special Rapporteur) said that he could agree to delete the phrase "confirming, supplementing, extending or amplifying the provisions thereof", although it appeared in other conventions, including the 1963 Vienna Convention on Consular Relations. He would also suggest, to meet Mr. Beesley's point, that the words "such new provisions" be replaced by "such new agreements".

12. Mr. BENNOUNA, agreeing with Mr. Arangio-Ruiz, said that the discussion on paragraph 3 put him in mind of the famous play "Much Ado About Nothing". He was certain that, if asked, very few members of the Commission would speak in favour of retaining the paragraph, which, despite the Special Rapporteur's commendable efforts, added nothing to traditional treaty practice. Moreover, he was not sure what was meant by provisions "incompatible with the object and purpose" of the draft articles. The ambiguity implicit in the original reference to article 6 thus persisted. Again, he saw no need for the provision that a treaty must not affect "the enjoyment by the other Parties to the present articles of their rights", which in effect was a stipulation in favour of a third party. For all those reasons, paragraph 3 served no useful purpose. However, he would not stand in the way of its adoption.

13. Mr. ILLUECA said that he could agree to the text proposed by the Special Rapporteur.

14. Mr. BARSEGOV thanked the Special Rapporteur for proposing a text that was not verbose, but concise. Each word had a firm legal basis and was in its rightful place.

15. Dreadful labour pains were attending the convention's birth, despite the fact that it had a solid legal foundation in both customary and written rules of international law. Paradoxically, more objections were being voiced to the present articles than to any other drafts, some of which had been less well grounded in existing rules of international law.

16. He could understand that there would be different approaches among members of the Commission and among States: indeed, that was why members of the Drafting Committee had always tried to reconcile opposing viewpoints.

17. Great concessions had been made in the Drafting Committee's work: for example, the régime of the future convention had been made not binding, but optional, for the diplomatic bags and diplomatic couriers of special missions and international organizations. He, too, was in favour of unifying the régime applicable to couriers and bags, but felt that that result should be achieved by bringing the régime applicable to consular bags and couriers to the level of that provided for diplomatic bags and couriers.

18. The concessions had been made with a view to achieving wide ratification of the convention, but it now appeared that those efforts to ensure that the greatest possible number of States became parties to it, and that it had a wide impact, had been in vain. It seemed that efforts were being made to counterpose a different régime to the convention, even before it had entered into force.

19. He was grateful to Mr. Arangio-Ruiz for pointing out that the intention behind the comments made on the new text of paragraph 3 proposed by the Special Rapporteur was to provide for the possibility not only of "confirming, supplementing, extending or amplifying" the provisions of the convention, but also of limiting them. That phrase brought up the whole question of what the legal interrelationship between the convention and others that would subsequently be adopted should be. The wording of the proposed text had been taken from article 73, paragraph 2, of the 1963 Vienna Convention on Consular Relations, which was the only convention to contain such wording. Neither the 1969 Convention on Special Missions, nor the 1975 Vienna Convention on the Representation of States, nor the 1961 Vienna Convention on Diplomatic Relations incorporated such a provision. However, since there was a trend towards including such language, he was prepared to go along with it, but was concerned about the submission of amendments to what was already an amendment. The proposed formulation permitted extension, but not restriction, of the provisions of the future convention, and was in conformity with the law of treaties in general and with the object and purpose of the draft articles in particular.

20. One proposal, Mr. Eiriksson's (para. 4 above), would only confuse the interrelationship between the convention and conventions that would subsequently be adopted. To remove the reference to "the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" would be to fail to specify the convention's very subject-matter in the text, and to delete the phrase taken from the 1963 Vienna Convention would be to expunge any mention of the possibility of interrelationships with subsequent conventions. Such deletions were proposed

because the text was "too wordy": but if wordiness brought precision, then he was in favour of wordiness.

21. He urged the Commission to adopt the text proposed by the Special Rapporteur if it wished to avoid creating a conflict of régimes with other, future conventions. The Commission was now considering the very last paragraph of the very last article, and should make no more changes, for the text met the requirements of international law in the matter.

22. Mr. ARANGIO-RUIZ said he wished to point out that his attitude was prompted not by opposition to the future convention, but by technical considerations. If two States believed their diplomats might be involved in drug trafficking and decided to abolish the use between themselves of the inviolable diplomatic bag, undertaking to inspect all diplomatic bags exchanged between them, there was nothing to prevent them from concluding such an agreement, either prior to or subsequent to the convention's entry into force. That was why he saw no need for the inclusion of paragraph 3.

23. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the proposal submitted by the Special Rapporteur was acceptable as a compromise text, and that some of the changes suggested during the meeting constituted improvements and should also be adopted. The provision's purpose being to prevent discrimination, what mattered most was that new agreements entered into by States parties to the present articles should not affect the enjoyment by other parties of the rights provided for in the articles. The provision was well founded, it was necessary, and it added an element of clarity.

24. Mr. Barboza's suggestion to delete the phrase "confirming, supplementing, extending or amplifying the provisions thereof", and to retain the phrase that Mr. Eiriksson thought should be deleted (see paras. 4 and 6 above), was a good one: future agreements should not be limited to "confirming, supplementing, extending or amplifying" the provisions of the articles. He would therefore endorse the text proposed by the Special Rapporteur, as amended by Mr. Barboza. Personally, he would also delete the words "are not incompatible with the object and purpose of the present articles and", but would not press for such a change.

25. Since the idea expressed in article III, paragraph 3, of both draft optional protocols was the same as that stated in article 32, paragraph 3, he hoped that the same text would be adopted, *mutatis mutandis*, for the protocols as well.

26. Mr. YANKOV (Special Rapporteur) said that he was duty-bound as Special Rapporteur, as a member of the Commission and as a lawyer to say that he did not agree with the statement that the words "are not incompatible with the object and purpose of the present articles" were unclear. The phrase might be subject to varying interpretations, but it was a standard formula, and he was surprised that doubts should be raised about it, especially in the Commission. It appeared in the 1969 Vienna Convention on the Law of Treaties, not only in article 19, on reservations, but also in article 18, which dealt with something much more important than reservations: the obligation of States, after signing and before ratifying a treaty, not to take any action that was not compatible with the object and purpose of the treaty. The formulation was also used in numerous treaties concluded recently.

27. The text now proposed for paragraph 3, incorporating the amendments suggested by Mr. Barboza and by himself, read:

"3. Nothing in the present articles shall preclude the Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such new agreements are not incompatible with the object and purpose of the present articles and do not affect the enjoyment by the other Parties to the present articles of their rights or the performance of their obligations under the present articles."

28. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the title and paragraph 3 of article 32 as amended by the Special Rapporteur and Mr. Barboza (paras. 3 and 27 above). The latter text would also be adopted, *mutatis mutandis*, for paragraph 3 of article III of draft Optional Protocol One.

It was so agreed.

The title and paragraph 3 of article 32 were adopted.

Article 32 was adopted.

Paragraph 3 of article III of draft Optional Protocol One was adopted.

Article III of draft Optional Protocol One was adopted.

Draft Optional Protocol One was adopted.

29. Mr. FRANCIS said that he wished to express his support for what the Special Rapporteur had said about the propriety of incorporating a reference to incompatibility. Article 47 of the 1969 Convention on Special Missions contained a similar provision.

30. There had been many comments about the need for paragraph 3. Actually, it was essential, because the diplomatic courier and diplomatic bag were covered by other conventions in which there were provisions that were identical, in substance, to the content of paragraph 3. To omit the facility that such provisions afforded States would clearly not be in the spirit of the other codification conventions.

Draft Optional Protocol Two on the Status of the Courier and the Bag of International Organizations of a Universal Character

31. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for draft Optional Protocol Two, which read:

DRAFT OPTIONAL PROTOCOL TWO ON THE STATUS OF THE COURIER AND THE BAG OF INTERNATIONAL ORGANIZATIONS OF A UNIVERSAL CHARACTER

The States Parties to the present Protocol and to the articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, hereinafter referred to as "the articles",

Have agreed as follows:

Article I

The articles also apply to a courier and a bag employed for the official communications of an international organization of a universal character:

(*a*) with its missions and offices, wherever situated, and for the official communications of those missions and offices with each other;

(*b*) with other international organizations of a universal character.

Article II

For the purposes of the articles:

(*a*) "diplomatic courier" also means a person duly authorized by the international organization as a courier who is entrusted with the custody, transportation and delivery of the bag and is employed for the official communications referred to in article I;

(*b*) "diplomatic bag" also means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by a courier or not, which are used for the official communications referred to in article I and which bear visible external marks of their character as a bag of an international organization.

Article III

1. The present Protocol shall, as between Parties to it and to the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 or the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in those Conventions.

2. The provisions of the present Protocol are without prejudice to other international agreements in force as between parties to them.

3. Nothing in the present Protocol shall preclude Parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such agreements do not result in discrimination within the meaning of article 6.

32. International organizations did use couriers and bags, and in some cases they were expressly authorized to do so by international conventions of a general character. The 1946 Convention on the Privileges and Immunities of the United Nations said that the United Nations had the right "to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags" (art. III, sect. 10). The 1947 Convention on the Privileges and Immunities of the Specialized Agencies recognized the right of the specialized agencies "to dispatch and receive correspondence by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags" (art. IV, sect. 12). Not only was the right to use couriers and bags admitted, but it was also recognized that such couriers and bags must have the same immunities and privileges as diplomatic couriers and bags of States.

33. The question of including couriers and bags of international organizations in the scope of the draft articles had been discussed almost from the beginning of the consideration of the topic. Opinions had been divided. At the time of the adoption of the draft articles on first reading, the view had prevailed that couriers and bags of international organizations should be left outside the articles, which should deal only with couriers and bags of States. In view of the comments and observations received from States, the Special Rapporteur had, in his eighth report (A/CN.4/417, para. 60), proposed adding a paragraph 2 to article 1 (Scope of the present articles), reading:

> "2. The present articles apply also to the couriers and bags employed for the official communications of an international organization with States or with other international organizations."

Article 2 would then have been deleted.

34. The Special Rapporteur's proposal had received support from a number of members of the Commission, although some of them had pointed out that the text did not cover communications between an international organization and its offices or agencies located away from headquarters. The Drafting Committee had considered that it would be overstepping its authority if it recommended such a fundamental change in the scope of the draft articles at the present stage. However, it had decided to recommend that States be afforded the possibility of applying the articles to couriers and bags of international organizations. To that end, it had prepared draft Optional Protocol Two.

35. The protocol was as straightforward as Optional Protocol One and followed the same structure. Article I defined the object and purpose: the application of the draft articles to couriers and bags employed for the official communications of international organizations of a universal character. It had been deemed prudent to speak only of international organizations of a universal character. The official communications in question were those which took place, first, within an organization, i.e between headquarters and missions and offices of the organization, or between those missions and offices; and, secondly, between the organization and other international organizations of the same universal character.

36. Article II defined the expressions "diplomatic courier" and "diplomatic bag". In the case of a "diplomatic courier", it supplemented article 3 of the draft articles by saying that that expression, as used in that article and throughout the draft, also meant a person duly authorized by an international organization as a courier, namely one entrusted with the custody, transportation and delivery of a bag and employed for the official communications of the organization, as defined in article I. Article II spoke only of "international organizations", without adding "of a universal character". The omission of the latter expression had no substantial significance and had been done for drafting reasons: otherwise, the text would have been unnecessarily cumbersome. As for the expression "diplomatic bag", the language used had been taken from article 3, paragraph 1 (2), of the draft articles.

37. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the same text, *mutatis mutandis*, for paragraph 3 of article III as it had for paragraph 3 of article 32 and for paragraph 3 of article III of Optional Protocol One (see paras. 27-28 above).

It was so agreed.

38. Mr. MAHIOU pointed to a discrepancy in the French texts of article III, paragraph 2, of the two optional protocols. In Optional Protocol One, the words *dans les relations* appeared between the words *en vigueur* and *entre les parties*, but in Optional Protocol Two they did not. As an advocate of linguistic concision, he would propose that Optional Protocol One be aligned with Optional Protocol Two.

It was so agreed.

39. Mr. KOROMA asked whether the words "the international organization", rather than "an international organization", were used in article II (*a*) because the reference was not to an international organization in the abstract, but to a particular organization that might have authorized a person to serve as a courier.

40. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he had no objection if Mr. Koroma preferred the words "an international organization".

41. Mr. YANKOV (Special Rapporteur) said that, in connection with a question on article 28, paragraph 2, he had explained (2130th meeting) that the use of the word "the" rather than "a" before the words "consular bag" was indispensable, because not every consular bag should be subjected to the procedure envisaged in that article. Draft Optional Protocol Two involved a different case, however, and the reference should be as general as possible. He could therefore agree to replacing the word "the" by "an" before the words "international organization" in article II (*a*). The Secretariat would, in any case, carefully review all the texts adopted, with a view to ensuring consistency of language and correct use of definite and indefinite articles.

42. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt draft Optional Protocol Two, with the amended text of paragraph 3 of article III already adopted (para. 37 above).

It was so agreed.

Draft Optional Protocol Two was adopted.

43. Mr. YANKOV (Special Rapporteur), replying to queries by Mr. Eiriksson, said that the relevant part of article 8, as amended (see 2128th meeting, paras. 92 *et seq.*), read: ". . . indicating his status and essential personal data, including his name and, where appropriate, his official position or rank . . ."; and that the final sentence of the English text of article 20, as amended (see 2130th meeting, paras. 33 *et seq.*), read: "An inspection in such a case shall be conducted . . .". As for article 30 (see 2131st meeting, paras. 10 *et seq.*), he proposed that the beginning of paragraphs 1 and 2 be amended in English to read: "Where, because of reasons of *force majeure* . . .".

It was so agreed.

44. Mr. EIRIKSSON proposed that the words "referred to in article 25", in paragraph 2 of article 28 (see 2130th meeting, paras. 89 *et seq.*), be replaced by "referred to in paragraph 1 of article 25". Pointing out that the word "articles" in paragraph 2 of article 25 (*ibid.*, paras. 72 *et seq.*) was employed in a sense which differed from that attached to the same word in paragraph 1 of the same article, he suggested that the end of paragraph 2 of article 25 be amended to read: ". . . other than the correspondence, documents or articles referred to in paragraph 1."

45. Mr. YANKOV (Special Rapporteur) said that he could accept the proposal regarding paragraph 2 of article 28. As to paragraph 2 of article 25, Mr. Eiriksson's point could be met more simply by replacing the word "articles" by "items".

46. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) associated himself with those observations and, accordingly, proposed that the relevant part of paragraph 2 of article 28 be amended to read: ". . . other than the correspondence, documents or articles referred to in paragraph 1 of article 25 . . .". In paragraph 2 of article 25, he proposed that the word "articles" be replaced by "items".

It was so agreed.

47. Mr. PAWLAK said that, at the end of the consideration of the topic, he wished to revert briefly to the question of the relationship between the draft articles and optional protocols just adopted and customary law. Although the Special Rapporteur and all members of the Commission had done their best to complete and supplement the existing conventions, they had failed to cover all aspects of questions relating to the topic. He had raised the matter during the work of the Drafting Committee and now wished, for the sake of consistency, to place on record that the Commission had discussed the issue and that one member had recommended that the problem be taken up at the future diplomatic conference and be reflected in the preambular part of the future convention on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

48. Mr. SEPÚLVEDA GUTIÉRREZ said that, as the present draft was the first set of articles to be adopted by the Commission since he had become a member, he wished to testify to so important an occasion and, in particular, to express his personal admiration of the Special Rapporteur and the Chairman of the Drafting Committee for their tireless efforts to steer the Commission's work on the topic towards a successful conclusion.

49. Mr. HAYES, reverting to Mr. Koroma's suggestion concerning article II (*a*) of Optional Protocol Two (para. 39 above), which had been accepted by the Chairman of the Drafting Committee and the Special Rapporteur, said that he did not disagree with replacing the word "the" by "an" before the words "international organization", but he was bound to point out that the same problem arose in article II (*b*) of Optional Protocol One, in article 3, paragraph 1 (1), of the draft articles, and in numerous other parts of the text. He was in favour of leaving article II of Optional Protocol Two unchanged in the interests of consistency, and therefore appealed to Mr. Koroma to withdraw his suggestion.

50. Before concluding his remarks, he wished to take the opportunity to associate himself with the tribute paid by Mr. Sepúlveda Gutiérrez to the Special Rapporteur and the Chairman of the Drafting Committee.

51. Mr. YANKOV (Special Rapporteur), emphasizing that English was not his mother tongue, said that the question of the use of the definite or indefinite article could safely be left to the Secretariat assisted by experts. As a general comment, he remarked that drafting changes of a cosmetic nature frequently defeated their purpose.

52. The CHAIRMAN suggested that the matter be left to the Secretary to the Commission, with instructions to ensure consistency throughout the draft.

It was so agreed.

53. Mr. OGISO said that, in response to a reservation he had expressed (2130th and 2131st meetings) in connection with article 28, the Special Rapporteur had explained that the provision in paragraph 1 exempting the diplomatic bag from examination "directly or through electronic or other technical devices" did not prevent two or more parties to the future convention from using such techniques by agreement amongst themselves. The Special Rapporteur had also said that he would provide the necessary clarification in the commentary. In view of the new wording of article 32, paragraph 3 (para. 27 above), he wished to request the Special Rapporteur to indicate in the same part of the commentary that such an agreement should not be regarded as being incompatible with the object and purpose of he future convention. The commentary should, of course, make it clear that that was the opinion of one member.

54. Mr. BARSEGOV said that he, for one, took the view that such an agreement would be incompatible with the future convention.

55. Mr. YANKOV (Special Rapporteur), reiterating the comments he had made at the previous meeting in connection with article 28, said that it was for the States concerned to establish a régime between themselves on the basis of reciprocity and in the exercise of their sovereign rights. More than 130 bilateral agreements making the diplomatic bag subject to the régime of the consular bag or vice versa were already in existence. The matter of electronic and other technical devices would seem to be one for the future, rather than for the present. He intended to follow the time-honoured practice of prefacing opinions reflected in the commentary with the words "A view was expressed to the effect that . . .".

ADOPTION OF THE DRAFT ARTICLES ON SECOND READING

56. The CHAIRMAN, noting that the second reading of the draft articles on the topic had been completed, suggested that the Commission should adopt the whole set of draft articles and the draft Optional Protocols thereto.

The draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier were adopted on second reading, together with the draft Optional Protocols thereto, unanimously.

57. Mr. SOLARI TUDELA said that, in the Drafting Committee, he had suggested that a provision be included in the draft articles to cover the exchange of consular bags between two consular posts headed by honorary consular officers. In reply, the Special Rapporteur had drawn attention to paragraph 4 of article 58 of the 1963 Vienna Convention on Consular Relations, which stated: "The exchange of consular bags between two consular posts headed by honorary consular officers in different States shall not be allowed without the consent of the two receiving States concerned." He had accordingly withdrawn his suggestion. The point he had raised was none the less valid where one or both of the two receiving States concerned was not a party to the 1963 Vienna Convention. He would therefore request the Special Rapporteur to include a passage in the commentary to deal with the question of the exchange of consular bags between honorary consuls.

58. Mr. EIRIKSSON said that, with the exception of one article, he had refrained from discussing the substance of the various draft articles when they had been adopted. He had done so in order to save time and also because he had had the opportunity to discuss his proposals for amendments in the Drafting Committee. He had been given a fair hearing both by the Drafting Committee and by the Special Rapporteur and was convinced that there was no majority view in favour of those of his proposed amendments which had not been accepted by the Committee. Hence he wished to place on record his reservations regarding a few of the articles finally adopted by the Commission.

59. His proposals at the previous session had been designed to make the draft more generally acceptable by keeping the provisions on the status of a courier to a minimum so as to avoid assimilating such status to that of diplomatic staff. In the first place, the draft should be entitled "Draft articles on the diplomatic courier and the diplomatic bag", bearing in mind that the articles dealt not only with the status of the unaccompanied bag but also with that of the accompanied bag. He could also support Mr. McCaffrey's suggestion to reverse, both in the title and in the articles themselves, the order in which the courier and the bag were mentioned.

60. Article 2 could well be deleted. He had a distaste for "do not prejudice" clauses in general. Article 7 could also be deleted, for it stated a self-evident fact. Paragraph 1 of article 9 was couched in terms that were far too indefinite for inclusion in a legal text. Admittedly, the same was true of the comparable articles in the codification conventions, but it was doubtful whether States in practice had any views at all on the nationality of couriers. Those that did have such views could express them to the States involved. The cases described in paragraphs 2 and 3 were much too detailed. As for those mentioned in paragraph 3, he failed to see why they should have been selected out of all the possible permutations of nationality. The codification conventions did not specify all of those categories. Plainly, article 9 could be deleted.

61. Articles 10 and 11 served no useful purpose. They would have been helpful if the Special Rapporteur's earlier draft articles on the commencement of functions had been retained. As matters now stood, the important point about privileges and immunities was covered in article 21. Article 13 could also be dispensed with, since "facilities" were not defined in paragraph 1 and since paragraph 2 was qualified by the phrase "to the extent practicable".

62. Article 17 placed an unnecessary burden on both the receiving State and the transit State and should not have been included. In the case of article 18, the immunity could have been confined to immunity from criminal jurisdiction, as set forth in paragraphs 1 and 5. In article 19, paragraph 2 was unnecessary, being a *de minimis* clause. Again, paragraph 1 of article 20 was a corollary of the inviolability enunciated in article 16 and could therefore have been dispensed with.

63. As to article 28, he would merely refer again to his proposal at the previous session, which had been reflected in the Commission's report.[7] His comments on article 32 had been made at the previous meeting.

DRAFT RECOMMENDATION OF THE COMMISSION

64. The CHAIRMAN proposed that, in accordance with article 23 of its statute, the Commission should recommend to the General Assembly that it convene an international conference of plenipotentiaries to consider the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and to conclude a convention and protocols on the subject. Since one of the optional protocols adopted by the Commission concerned the couriers and bags of international organizations of a universal character, the General Assembly would also have to decide whether to permit such organizations to participate in the conference. The conference would also have to deal with the final clauses of the convention, including the clauses on the settlement of disputes.

65. He invited the Commission to adopt the substance of that draft recommendation, leaving the final wording to the Secretariat.

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[7] See 2130th meeting, footnote 12.

66. Mr. YANKOV (Special Rapporteur) said that the form the draft articles should ultimately take would be the subject of a passage for inclusion in the Commission's report on its present session. In the relevant General Assembly resolution, the Commission had been instructed to formulate "an appropriate legal instrument". The question had been discussed on a number of occasions, more particularly in connection with the consideration of his eighth report (see A/CN.4/417, paras. 32-38), and the Commission had then agreed that the draft articles would take the form of a draft convention.

67. Mr. TOMUSCHAT pointed out that, in certain cases, such as that of the 1969 Convention on Special Missions, draft articles adopted by the Commission on a particular topic had been referred not to a diplomatic conference, but to the Sixth Committee of the General Assembly for adoption as a convention. That procedure spared Governments the expense of sending representatives to a conference. The matter was of particular importance to developing countries. He would suggest that the General Assembly could decide whether to convene a conference of plenipotentiaries or to have the future convention adopted within the framework of the Sixth Committee.

68. The CHAIRMAN said that, under the draft recommendation he had proposed, it was indeed the General Assembly that would decide how the future convention would be adopted. The main point of the recommendation was that the draft articles should become a convention.

69. Mr. DÍAZ GONZÁLEZ drew attention to article 23, paragraph 1 (*c*), of the Commission's statute, whereby the Commission was empowered to recommend to the General Assembly "To recommend the draft to Members with a view to the conclusion of a convention". Under paragraph 1 (*d*), the Commission could recommend to the General Assembly "To convoke a conference to conclude a convention". Pursuant to those provisions, it could be left to the General Assembly to decide which body would adopt the future convention.

70. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the draft recommendation he had proposed.

The draft recommendation was adopted.

DRAFT RESOLUTION OF THE COMMISSION

71. Mr. REUTER, speaking as the longest-serving member of the Commission, said that, in conformity with tradition, on the conclusion of the work on a topic, it was appropriate for the Commission to express its gratitude and appreciation to the Special Rapporteur. He accordingly proposed the following draft resolution, on the understanding that the final wording could be adjusted by the Secretariat in the light of the appropriate precedents:

"*The International Law Commission,*

"*Having adopted* the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier,

"*Desires to express* to the Special Rapporteur, Mr. Alexander Yankov, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft by his tireless efforts and devoted work and for the results achieved in the elaboration of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier."

72. As the senior member of the Commission, he felt he could add a few words to express the hope that members would do their best to be present in the Commission and the Drafting Committee when a matter of interest to them was being discussed. The Commission suffered from an over-abundance of talent, which meant that some members were often called away to other important duties. As a result, their statements did not always take place at the most appropriate moment for the Commission.

73. Mr. McCAFFREY and Mr. FRANCIS said that they heartily endorsed the tribute paid by Mr. Reuter to the Special Rapporteur.

74. Mr. THIAM said that members who did not take the floor also shared the feelings of gratitude and admiration for the Special Rapporteur and would be expressing those feelings by supporting the draft resolution proposed by Mr. Reuter.

75. The CHAIRMAN said that the draft resolution proposed by Mr. Reuter would be considered together with the corresponding part of the Commission's draft report. At that time, there would be an opportunity for members to pay a well-deserved tribute to the Special Rapporteur.

76. He proposed that the Commission should adjourn to allow the Planning Group to meet.

It was so agreed.

The meeting rose at 12.10 p.m.

2133rd MEETING

Friday, 7 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

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

Relations between States and international organizations (second part of the topic) (A/CN.4/401,[1] A/CN.4/424,[2] A/CN.4/L.383 and Add.1-3,[3] A/CN.4/L.420, sect. E, ST/LEG/17)

[Agenda item 8]

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[1] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

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

[3] Reproduced in *Yearbook ... 1985*, vol. II (Part One)/Add.1.

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his fourth report on the topic (A/CN.4/424), which contained draft articles 1 to 11.

2. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) said that he regretted having, for the second time, to submit a report which, owing to lack of time, would not be discussed. Yet the topic entrusted to him was of fundamental importance in view of the increasing interdependence of human groups characteristic of the second half of the twentieth century. Extraordinary technological advances, particularly in means of communication and transport, were bringing people closer together and gave them a feeling of solidarity and an awareness of belonging to one single human race. That awareness was reflected in the co-operation of States, which together were trying to solve a whole range of problems—political, social, economic, cultural, humanitarian, technical and others—the magnitude of which exceeded the capacities of the individual members of the international community.

3. In order to regulate, direct and give practical effect to their co-operation, States had recourse to the main means available to them under international law: the treaty. It was by treaty that they established the permanent functional organs, independent of themselves, which they needed to attain their objectives. In so doing, States had recognized what Mr. Reuter had called the "regulatory power" of international bodies, which enabled them to act faster and more effectively than traditional diplomatic conferences.

4. Since the Second World War, the proliferation of international organizations of a universal or regional character had helped to transform international relations. The development of the new international law was based on the multilateral co-operation of States. The new international economic law, international criminal law, environmental law and diplomatic law itself were evolving on the basis of the new multilateral relations and of the concept of inter-State co-operation, which was a consequence of the growing interdependence of the different human groups inhabiting the Earth. In the modern world, international relations were no longer the concern of States alone.

5. Every legal system logically determined the entities having the rights and duties recognized under the rules it laid down. Before the appearance of international organizations, States had been the only subjects of international law recognized as having international personality. Now international organizations also had international personality, as the ICJ had held in its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, in which it had concluded that such personality should be understood to mean "capable of possessing international rights and duties".[4]

6. Such personality had many practical consequences. For example, international organizations contributed to the development of international law by observing customary rules, drawing up international agreements and adopting international norms. They could incur international responsibility, but they could also assert their rights internationally and exercise "functional protection", analogous to diplomatic protection, in respect of their officials or agents. They could also be parties to international arbitration. The regulatory provisions which denied them access to certain permanent bodies, such as the ICJ, were not consonant with the present state of the international community, or with its foreseeable development.

7. Naturally, the personality of international organizations could not be as comprehensive as that of States. In the words of the ICJ in the advisory opinion cited above: "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights; and their nature depends upon the needs of the community."[5] Moreover, the competence of international organizations was delimited by the provisions of their constituent instruments and the general functions entrusted to them. None the less, the extent of their competence and their international personality had not only opened up new chapters in international administrative law, but had transformed the very concept of positive international law, which was no longer just a law of relations between States, but also a law of international organizations.

8. In short, it could be said that, whereas States had been the original subjects of international law and were still at the heart of international life, in which the concept of sovereignty—that essential attribute of the State—had a decisive influence, international organizations, created by the will of States, had international personality at a secondary level. As for individuals, they acquired such personality indirectly through the machinery set up by international organizations, to which individuals had access.

9. How was the expression "international organization" to be understood? In general, legal writers had welcomed a definition proposed in 1956 during the Commission's work on the codification of the law of treaties, according to which an "international organization" was "a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member States".[6] But that definition had not been accepted either by the United Nations Conference on the Law of Treaties or by subsequent codification conferences. Article 2 of the 1969 Vienna Convention on the Law of Treaties, whose sole purpose was to determine the scope of that Convention, merely stated, in paragraph 1 (i): "'international organization' means an intergovernmental organization". That definition was consistent with the terminology adopted by the United Nations, which described international organizations as intergovernmental organizations, in contradistinction to non-governmental organizations.

10. Two French jurists, Reuter and Combacau, had described an international organization as "an entity which has been set up by means of a treaty concluded by States to engage in co-operation in a particular field and which has its own organs that are responsible for engaging in independent activities".[7]

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[4] *I.C.J. Reports 1949*, p. 174, at p. 179.

[5] *Ibid.*, p. 178.

[6] Draft article 3 (*b*) submitted by Sir Gerald Fitzmaurice in his first report on the law of treaties (*Yearbook ... 1956*, vol. II, p. 108, document A/CN.4/101).

[7] See the Special Rapporteur's second report, *Yearbook ... 1985*, vol. II (Part One), p. 106, document A/CN.4/391 and Add.1, footnote 17.

11. It was interesting to note that the definitions proposed in the numerous legal and political publications dealing with the question all mentioned three constituent elements of an international organization: (*a*) the basis, consisting of a treaty which, from the legal point of view, was the constituent instrument and reflected a political will to co-operate in certain areas; (*b*) the institutional structure, which guaranteed a measure of permanence and stability in the functioning of the organization; (*c*) the means, which consisted of the functions and powers of the organization and reflected some degree of autonomy *vis-à-vis* its members. In legal terms, that autonomy was reflected in the existence of decision-making machinery which in turn reflected the organization's own will—which was not necessarily the same as that of each of its members—thereby attesting to the reality of its legal personality.

12. The 1947 Convention on the Privileges and Immunities of the Specialized Agencies did not speak of "international organizations". In article I (Definitions and scope), section 1 referred only to "specialized agencies", which it listed and to which it added "Any other agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter".

13. From the start of its work on the law of treaties, the Commission had adopted a pragmatic position, which was reflected in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character and in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. He had adopted the same position in his study of the present topic, in order to avoid any discussion of a doctrinal nature.

14. The first point to be noted in that context was that, in addition to the capacity to contract which intergovernmental international organizations possessed (capacity to contract, to acquire and sell movable and immovable property and to institute or be a party to legal proceedings), the United Nations and its specialized agencies enjoyed certain privileges and immunities that were recognized in general treaties and headquarters agreements, as well as in supplementary instruments. In that connection, he cited a passage from his fourth report (A/CN.4/424, paras. 27-31) and referred to the first treaty to have granted privileges to international officials—the 1826 Treaty of Panama.

15. The privileges and immunities granted to international organizations and their officials and agents were based essentially on the principle *ne impediatur officia*, the intention being to enable them to perform their duties without hindrance. According to Jacques Secretan, the basis for those privileges and immunities was the independence necessary for functions performed in the interests of the international community.

16. Although the Covenant of the League of Nations had referred to "diplomatic privileges and immunities" (Art. 7, para. 4), almost all of the instruments relating to existing international organizations had discarded that formula in favour of the principle *ne impediatur officia*. The Charter of the United Nations provided in Article 105, paragraph 1, that: "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes." Paragraph 2 of the same Article confirmed that principle in the following terms: "Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." The *ne impediatur officia* principle allowed privileges and immunities to be granted when the interests of the function so required and set the limits beyond which there was no need to grant them.

17. After citing paragraph 32 of his fourth report, he stressed that the privileges and immunities of international organizations and their officials were now based on solid legal instruments, which established a right unrelated to any consideration of comity. Furthermore, since international organizations could not enjoy the protection conferred by territorial sovereignty, as States could, their only protection lay in the immunities granted to them. The extent of their immunity was justified by the fact that States were political entities which pursued their own interests, whereas international organizations were service agencies, which acted on behalf of all of their members.

18. Referring to the general structure of the draft articles he was preparing, he said that, in accordance with the schematic outline proposed in his third report (A/CN.4/401, para. 34) and approved by the Commission, part I consisted of an introduction containing articles on the terms used, the scope of the draft articles and the relationship between the draft articles and the relevant rules of international organizations, and between the draft articles and other international agreements. Part II dealt with legal personality. Part III, which dealt with property, funds and assets, would be completed by a section on the archives of international organizations. Part IV would include provisions on the facilities of international organizations in respect of communications. Part V would deal with the privileges and immunities of international officials.

19. Finally, he trusted that, if it was not to be discussed at the current session, the topic of relations between States and international organizations (second part of the topic) would be considered by the Commission at its next session.

20. Mr. ARANGIO-RUIZ asked whether the Special Rapporteur could arrange for the text of his introductory statement to be circulated.

21. The CHAIRMAN said that the secretariat was at the Special Rapporteur's disposal for that purpose. He thanked him for the timely submission of his report and for the patience and understanding he had shown with respect to the constraints imposed by shortage of time.

22. Mr. ILLUECA, congratulating the Special Rapporteur on the quality of his fourth report (A/CN.4/424), which made an important contribution to the study of the topic and attested to the depth of his thinking, recalled that 14 years had elapsed since the consideration of the first part of the topic had culminated in the adoption of a convention. That instrument—the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character—drew attention, in the very first paragraph of the preamble, to the increasingly important role of multilateral diplomacy in relations between States and the responsibilities of international organizations of a universal character within the international community. In his view, that importance and those responsibilities had further increased with time, particularly for the developing

countries, and it was essential for the future of the United Nations and other international organizations of a universal character that the study of the second part of the topic be successfully completed. He therefore urged—as he would in the Sixth Committee of the General Assembly—that at its next session the Commission should devote all the necessary time to consideration of the topic.

The law of the non-navigational uses of international watercourses (*concluded*)* (A/CN.4/412 and Add.1 and 2,[8] A/CN.4/421 and Add.1 and 2,[9] A/CN.4/L.431, sect. C, ILC(XLI)/Conf.Room Doc.4)

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

PARTS VII AND VIII OF THE DRAFT ARTICLES:

ARTICLE 24 (Relationship between navigational and non-navigational uses; absence of priority among uses)

and

ARTICLE 25 (Regulation of international watercourses)[10] (*concluded*)

23. Mr. McCAFFREY (Special Rapporteur), continuing his introduction of chapters II and III of his fifth report (A/CN.4/421 and Add.1 and 2), containing draft articles 24 and 25 respectively, said that chapter II related to a question that would be dealt with in the final clauses, namely the relationship between non-navigational and navigational uses. It came before chapter III because it was the last of the chapters dealing with fundamental questions. Chapter III dealt with the regulation of international watercourses, one of the "other matters" which, as indicated in the outline proposed in his fourth report (A/CN.4/412 and Add.1 and 2, para. 7), could be covered in the draft articles themselves or in annexes, since they were not fundamental questions.

24. At the next session, in accordance with the schedule for submission of remaining material set out in his fourth report (*ibid.*, para. 8), he would introduce questions relating to the management of international watercourses, the security of hydraulic installations and the settlement of disputes.

25. With regard to draft article 24—which was, of course, a provisional number—he observed that the Commission had already recognized the interrelationship between navigational and non-navigational uses in article 2, on the scope of the draft, as provisionally adopted, paragraph 2 of which—quoted in his fifth report (A/CN.4/421 and Add.1 and 2, para. 121)—showed the course to be followed. The basic point was that there was no longer any absolute priority of uses, and he referred members in that connection to the account given in his report (*ibid.*, paras. 122-124) of the demise of the priority formerly accorded to navigation.

26. Accordingly, article 24, paragraph 1, provided that neither navigation nor any other use enjoyed an inherent priority over other uses. The Commission could, of course, consider indicating, if not priorities, an order of preference in that paragraph. There was general recognition that protection of the environment and of the quality of water was assuming a particular urgency and the Commission might wish, for example, to provide some indication in the article that domestic and agricultural uses should not be foreclosed by other uses.

27. Turning to chapter III of the report, he explained that, in the context of the present topic, the expression "regulation of international watercourses" had a specific meaning, namely the control of the water in a watercourse, by works or other measures, in order to prevent harmful effects and maximize the benefits of the watercourse (*ibid.*, para. 129). That subtopic was therefore broader than that of water-related hazards and dangers, dealt with in chapter I of the report, which was concerned only with measures designed to prevent the harmful effects of water. State practice, as described in the report (*ibid.*, paras. 132-138), demonstrated the importance States attached to regulation.

28. Draft article 25 was a very modest provision—perhaps even too simple—and the Commission might at its next session consider the insertion in paragraph 1 of a provision requiring watercourse States to consult with each other, at the request of any one of them, for the purpose of regulation.

29. Paragraph 2 stated an obligation which reflected actual practice. On that point he referred members to the 1961 Treaty between Canada and the United States of America relating to co-operative development of the water resources of the Columbia River basin.[11] That instrument was typical of the trends in that area.

30. Lastly, it was desirable that, at its next session, the Commission should allocate a sufficient number of meetings for consideration of the topic, both in plenary and in the Drafting Committee. The Drafting Committee had not in fact been able to consider the topic at the present session, although four draft articles had already been referred to it. If sufficient time were not allocated, the Commission would not be able to complete the first reading of the draft, as planned, before the end of the term of office of its current members in 1991.

The meeting rose at 11 a.m.

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* Resumed from the 2126th meeting.

[8] Reproduced in *Yearbook ... 1988*, vol. II (Part One).

[9] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[10] For the texts, see 2126th meeting, para. 81.

[11] United Nations, *Treaty Series*, vol. 542, p. 244.

2134th MEETING

Tuesday, 11 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

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

Co-operation with other bodies (*concluded*)*

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Leoro Franco, Observer for the Inter-American Juridical Committee, to address the Commission.

2. Mr. LEORO FRANCO (Observer for the Inter-American Juridical Committee) said that it was once again a privilege for him to address the Commission on behalf of the Inter-American Juridical Committee: the Commission's outstanding work in the progressive development and codification of international law had gained world-wide recognition and would help to place international relations on a firm foundation of fairness and justice.

3. The Committee placed great value on the regular exchange of observers with the Commission and it was to be hoped that that exchange would be maintained, enabling the two bodies to keep abreast of each other's activities. Owing to the financial difficulties of its parent body, the Organization of American States, the Committee's activities had been curtailed by a half. It had had to give up one of its two annual sessions and hold only one session in August. As a result of those circumstances beyond its control, the Committee's work had experienced some inevitable delays.

4. In addition to the close ties of co-operation between the two bodies, valuable personal relations had been established between the members of the Commission and the Committee. Thus, like other past chairmen of the Commission, Mr. Díaz González had been invited to lecture in the course on international law which the Committee held annually for young professors of international law, judges and foreign-service officials from various American countries. He expressed the hope that the present Chairman of the Commission, whose writings he had had occasion to read and admire, would agree to give a lecture during the course to be held in August 1989.

5. In 1988, the Committee had dealt with 7 of the 12 items on its agenda. The first was that of guidelines relating to extradition in cases of drug trafficking. In April 1986, an Inter-American Conference had been held at Rio de Janeiro to consider the alarming problem of the production and consumption of, and illicit traffic in, narcotic drugs and psychotropic substances. The programme of action adopted by the conference contained numerous suggestions and recommendations to the various OAS organs, including the Inter-American Juridical Committee. In turn, the OAS General Assembly had on 15 November 1986 adopted a declaration condemning drug trafficking as an international crime.

6. The Committee and its Rapporteur, Mr. Manuel Vieira, had prepared a draft resolution for submission to the OAS General Assembly on judicial co-operation with regard to extradition. In view of the difficulty of framing multilateral instruments and the time required for them to be ratified, the proposed resolution was directed at ensuring the best possible interpretation for the expeditious granting of extradition under the provisions of domestic legislation or those of the relevant inter-American extradition treaties. The resolution also safeguarded the observance of human rights and of due legal process. Again, where domestic legislation left extradition to the discretion of the executive, the resolution specified that, in the event of refusal of extradition, the reasons should be stated.

7. The Committee had considered the difficulties involved in applying the terms of that resolution in the light of the provisions of national legislation and extradition treaties. It had accordingly decided to prepare two drafts, namely a draft American convention on extradition and preventive measures against drug trafficking and a draft declaration on the same subject. Both texts characterized drug trafficking as an "international crime", a term which had a clear meaning in the international legal order and which provided a legal basis for the broadest judicial co-operation. For the purposes of extradition, article 2 of the draft convention defined narcotics offences as acts which were basically identical to those listed in article 36 of the 1961 Single Convention on Narcotic Drugs.

8. The draft convention also sought to facilitate compliance with the so-called "dual incrimination" requirement, i.e. the rule whereby extradition was granted only when the act in question was an offence under both the law of the requesting State and that of the requested State. The draft convention specified that, in order to meet the requirement in question, it sufficed for the acts concerned to be basically similar to those listed in article 2—in fact those envisaged in article 36 of the 1961 Single Convention. In the event of evidence of an offence being discovered subsequent to the request for extradition, the requesting State could inform the requested State of its intention to prosecute the extradited person for the offence in question. Failing a reply within 60 days, the proceedings could go ahead. Arrangements were made so that it would be easier to obtain evidence of drug-trafficking offences and the parties to the future convention were also required to facilitate the execution of preventive measures in respect of property connected with drug-trafficking offences ordered by the judicial authorities of other parties.

9. Article 11 of the draft convention required the parties to interpret, or if necessary amend, their domestic legislation in order to establish that their courts had jurisdiction to try any person accused of drug-trafficking offences when, for any reason, that person could not be surrendered to the State in whose jurisdiction the offence had been committed. That was a provision intended to deal, among other things, with the problem of States whose domestic law prohibited the extradition of nationals. The draft convention had been adopted unanimously by the Committee, subject to some reservations expressed by the Rapporteur because of the failure to include some of his suggestions.

10. The second item examined by the Committee concerned the reasons for the failure of a great number of States to become parties to the 1948 American Treaty on Pacific Settlement (Pact of Bogotá). The OAS General Assembly, at its 1987 session, had assigned the topic to

* Resumed from the 2128th meeting.

the Committee, which had appointed as its Rapporteurs Mr. Luis Herrera and himself (Mr. Leoro Franco). The topic was largely political in character. Moreover, since the adoption of the Pact of Bogotá, a considerable number of new member States that had joined OAS had not subscribed to the Pact. In the circumstances, the Committee had adopted a suggestion by the Rapporteurs to request the Secretary-General of OAS to write to the member States concerned, asking them to explain their reasons for not acceding to the Pact. It would not be easy to obtain replies to that enquiry.

11. The law of the environment was the third item. In that connection, the Committee's observer at the Commission's previous session had referred to the draft American declaration on the environment.[1] The topic was one on which the Committee had been working for the past five years and on which he himself had submitted three reports as Rapporteur. So far, the Committee had adopted 12 articles on first reading on various aspects of the protection of the environment, which was characterized as the common heritage of mankind. Transboundary air pollution was treated as a matter of international concern. In the event of planned activities that could materially affect the environment, preventive measures as well as remedial action were proposed. The liability of the State causing the transboundary pollution was specified and involved the obligation to make reparation by restoring the pre-existing situation and compensating the injured State or States. The responsible State would in turn be able to claim a refund of the reparation from the actual polluters, including transnational corporations.

12. The sovereign right of States to exploit their own natural resources and to produce goods derived from human activities in accordance with their respective development plans was not affected. It was also proposed that, when a State was notified of works being planned by another State that could have harmful transboundary effects and did not reply within three months of the notification, it would be assumed to have no objection. Should an objection be formulated and no solution be found through the diplomatic channel, either of the parties could request the establishment of a mixed commission which would be purely a negotiating body without any mediating—or, still less, judicial—functions. The mixed commission would endeavour to work out a settlement on the basis of the relevant technical factors. Only in the event of failure of that machinery would the methods of peaceful settlement under international law be used.

13. The fourth item examined by the Committee was that of the draft additional protocol to the 1969 American Convention on Human Rights (Pact of San José). The purpose of the protocol was to deal with the protection of economic, social and cultural rights, to which the Pact of San José devoted only one article: article 26. The Rapporteur for the topic, Mr. Emilio Rabasa, had submitted a valuable study on economic, social and cultural rights, as well as on the rights of peoples, such as the right to solidarity. In his report, Mr. Rabasa had proposed possible mechanisms for the promotion and protection of the rights in question. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, with quasi-judicial and judicial functions respectively, already existed to defend civil and political rights. Moreover, mechanisms were available under the International Covenant on Economic, Social and Cultural Rights. Bearing those facts in mind, the Rapporteur had suggested that the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture should—through *ad hoc* commissions—receive reports from member States on the application and development of the rights in question. Further to the examination of those reports, recommendations could be made for more effective application of the human rights involved. The two bodies would in turn report to the OAS General Assembly, the Inter-American Commission on Human Rights and agencies interested in certain matters, such as the Pan American Health Organization. The Committee had requested the Rapporteur to continue his work on the topic.

14. The fifth item was the improvement of the administration of justice in the Americas. The subject was one which had been studied mainly in inter-institutional meetings, which had led to suggestions for an open seminar on problems that were stubborn, and it was bound to be a long time before that work had an impact on domestic legislations. The work in question had benefited from the active co-operation of a number of bodies, such as the Inter-American Bar Association, the OAS General Secretariat and the American Society of International Law. Financial support had been provided by the United States Agency for International Development. At its 1988 session, the Committee had decided to keep the topic on its agenda and to include the following subtopics: exchange of information and research; alternative forms of settlement of disputes (conciliation, mediation, arbitration); the judicial career; and access to justice.

15. The principle of self-determination and its scope of application was the sixth item examined by the Committee, on the basis of a report submitted by Mr. Policarpo Callejas Bonilla. The report had explained that the principle of self-determination had been a fundamental tool in the decolonization process and was thus only of limited application in the Americas. The Rapporteur had also expressed the view that the right freely to choose the economic, political and social model of the State had one major limitation, namely that the model not only should not be in conflict with democracy, but also should tend to establish or improve on democracy. The idea was an interesting one, but the Committee had not been able to reach a conclusion, particularly since the Rapporteur had now been appointed a judge at the Inter-American Court of Human Rights.

16. The seventh item concerned the revision of the inter-American conventions on industrial property. The rapporteurs for the topic, bearing in mind the work on the protection of industrial property being carried out by WIPO and in the GATT Uruguay Round, had felt that it would not be appropriate at the present stage to submit any proposals for a new convention or for the revision of older instruments. The Committee had accepted that recommendation, reserving the right to take up the topic again if later developments so justified.

17. The Committee had held a special session from 12 to 14 October 1988 at the request of the OAS Permanent Council to study the problem of the privileges and immunities of the persons referred to in article 140 of the

[1] See *Yearbook . . . 1988*, vol. I, p. 30, 2047th meeting, para. 55.

OAS Charter and to consider the request of the Permanent Council for an opinion on the question whether the provisions of the 1975 Bilateral Agreement between the United States of America and the OAS relating to privileges and immunities of representatives to the Council of the Organization and other members of delegations were compatible with those of articles 78, 138 and 140 of the OAS Charter. The question was a complicated one and the Committee had had only three days to examine the various problems stemming from the lack of harmony between the texts in question. In response to the request made by the Permanent Council, the Committee had expressed the view that the provisions of the 1975 Agreement were not incompatible with articles 78, 138 and 140 of the OAS Charter.

18. The Committee had also been called upon to state whether the 1975 Agreement adequately developed the above-mentioned provisions of the OAS Charter, in which connection it had been of the opinion that the Agreement was not adequate to determine the content of "prerogatives of residence" or the method of settlement of any disputes which might arise from its application. Moreover, article 1 of the Agreement did not cover all the categories of persons referred to in article 140 of the OAS Charter. In addition, article 2 could be applied in such a way as to hinder the normal operation of the representation to OAS of a State whose Government was not recognized by the host State. The Committee took the view that the Agreement should have contained some provision for a procedure for consultation, both with the sending State and with OAS itself, in those cases in which the host State requested the departure from the country of a representative to OAS on the basis of article 3 of the Agreement. To that end, the procedures provided for in the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations could serve as a basis for future negotiations on the subject. Whatever the procedure that might be adopted, the Committee had concluded by stressing the need to safeguard the independence of OAS organs and of the representatives of member States and, as far as the host State was concerned, the imperative need to bring to an end as speedily as possible situations which affected its security or its public order.

19. The Inter-American Juridical Committee also had the task of preparing the forthcoming Fourth Inter-American Conference on Private International Law, to be held at Montevideo to mark the hundredth anniversary of the treaties on private international law signed in that city in 1889.

20. Lastly, he wished to mention the possibility of a proposal being made to the General Assembly of the United Nations for the declaration of a Decade of International Law, to begin in 1990, so as to mark the hundredth anniversary of the 1899 Hague Convention for the Pacific Settlement of International Disputes. The proposal was expected to be the outcome of the meeting of the Ministers of Foreign Affairs of the Movement of Non-Aligned Countries held from 26 to 29 June 1989 at The Hague. If adopted, such a declaration would no doubt involve the United Nations in a series of activities in the field of the progressive development of international law in which the International Law Commission would play its customary role, thereby strengthening the search for peace under law and justice.

21. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for his interesting and comprehensive statement and for the kind invitation to attend the Committee's next session. Close co-operation with the Committee had always been most rewarding for the members of the Commission. Many of the topics on the Committee's agenda were directly connected with the Commission's work. To mention only one example, the convention against drug-trafficking now in preparation would be of the utmost interest to the Commission. In that connection, members of the Committee might be interested to learn that the Commission had discussed drug-trafficking as a crime against humanity in the context of its work on the draft Code of Crimes against the Peace and Security of Mankind.

22. Mr. ILLUECA, speaking on behalf of members of the Commission who were also from countries members of OAS, thanked the Observer for the Inter-American Juridical Committee for his valuable in-depth statement. The important work being done by the Committee was greatly appreciated, as were its continuing relations with the Commission. Besides the issue of drug trafficking, which, as the Chairman had just pointed out, came within the Commission's purview as a crime against humanity, the environmental issue currently under consideration by the Committee was also of great interest to the Commission because of its similarity with the topic of the law of the non-navigational uses of international watercourses. In conclusion, he congratulated the Observer on pointing out the importance of the contribution of the Americas to contemporary international law.

23. Mr. McCAFFREY said that he, too, wished to stress the parallel between the work being done by the Inter-American Juridical Committee on international environmental law and the Commission's consideration of the topic of the law of the non-navigational uses of international watercourses, for which he was Special Rapporteur. An opportunity to study the draft declaration currently under consideration by the Committee, and particularly the section on the settlement of disputes, would be extremely valuable to him in preparing his report for the Commission's next session. It would be regrettable if interaction between the two bodies were confined to a single statement delivered annually in plenary session; ongoing collaborative efforts during the year should also be encouraged. Having represented the Commission at the Committee's session at Rio de Janeiro two years earlier, he wished to recommend that future representatives of the Commission should adopt the practice of addressing the Committee's seminar on international law on the subject of the Commission's current work, especially in areas of interest to Latin America. The Commission owed a debt of gratitude to the Committee for its work in exploring uncharted legal territory which, as it were, prepared the ground for its own activities.

24. Mr. KOROMA, speaking also on behalf of members of the Commission from African countries, associated himself with the previous speakers in expressing appreciation for the statement made by the Observer for the Inter-American Juridical Committee. The breadth of the Committee's range of activities was truly impressive. The process of cross-fertilization produced by the continuing close contact between the Committee and the Commission not only

benefited the work of both bodies, but also enhanced the rule of law in international relations as a whole. The long-standing solidarity between Latin America and Africa covered many fields, including that of law. Africa acknowledged with pride and gratitude that it had borrowed from Latin America the principle *uti possidetis* and had used it extensively to defuse border and territorial problems which had arisen in African countries directly after independence. The African countries looked forward to new developments in the Committee's work, and wished it every success in its future endeavours.

Statement by the Observer for the European Committee on Legal Co-operation

25. The CHAIRMAN invited Mr. Harremoes, Observer for the European Committee on Legal Co-operation and Director of Legal Affairs of the Council of Europe, to address the Commission.

26. Mr. HARREMOES (Observer for the European Committee on Legal Co-operation), having recalled that the Council of Europe had recently celebrated the fortieth anniversary of its establishment, said that, with the accession of San Marino and Finland in November 1988 and May 1989, respectively, the Council's membership now included all the 23 pluralist parliamentary democracies in Europe. That development gave additional impetus to the Council's work towards the creation of a true "European legal space" for all its members, whether or not they were engaged in co-operation in other European contexts.

27. On the occasion of the Council's anniversary, the Committee of Ministers had adopted a declaration dealing, *inter alia*, with future relations with the States of Eastern Europe, in which it welcomed the policy of reform embarked upon by several of those countries and declared its willingness to engage in a dialogue with them on the observance and practical implementation, at both the national and the international levels, of the principles of human rights and democracy. In particular, the Council was ready to consider possibilities of organizing meetings and information exchanges among experts on all matters pertaining to its activities, of facilitating accession to Council conventions, and of more structured co-operation with some of the countries concerned. In that connection, it was to be noted that Hungary had already been invited to accede to three conventions and had asked to be invited to accede to 10 others, while Poland had been invited to accede to one convention. The Council of Europe welcomed those developments, which had found striking confirmation in Mr. Gorbachev's visit to the Parliamentary Assembly at Strasbourg the previous week.

28. The European Ministers of Justice had met in formal conference at Lisbon in 1988 and at an informal meeting at The Hague in 1989. One of the topics discussed at the Conference had been that of penal and criminological issues arising from the propagation of contagious diseases, including AIDS. The Ministers of Justice had placed emphasis on preventive measures and research, taking the view that criminal law in that field should intervene only as a last resort. Principles for a common policy, relating particularly to measures to be taken in prisons, were to be elaborated by the European Committee on Crime Problems. Other topics considered had been that of sexual exploitation, pornography, prostitution and traffic in children and young adults, and also that of the primacy of the interests of the child in the sphere of private law. The informal meeting, for its part, had considered the question of legal problems arising from the use of modern systems of payment, particularly that of liability and proof in cases of electronic transfers of funds, and the issue of co-operation between the public and private sectors in crime-control measures.

29. Over the previous 12 months, two new conventions, on "insider" trading and on transboundary television broadcasting and retransmission, had been opened for signature by member States and by the European Community. Both contained a so-called "disconnection" clause establishing the precedence of Community rules in governing relations between Community members.

30. Since the previous year, various committees of government experts had continued their activities in the field of civil and administrative law. The committee of experts on public international law had examined certain matters relating to the privileges and immunities of international organizations, in particular those of a commercial or technical nature, and had drawn up a draft recommendation on the subject which was to be considered by the Committee of Ministers later in the year. The European Committee on Legal Co-operation had transmitted to the Committee of Ministers an opinion prepared by the same committee of experts on the subject of the draft European convention for the protection of the underwater cultural heritage, whose adoption had unfortunately been prevented by lack of agreement on the delimitation of maritime territories in the Aegean. In the field of modernization of private and public law, the European Committee had considered the problem of multiple nationality in families. A special meeting on dual-nationality problems held in 1988 had, in particular, discussed issues connected with the application of the 1963 Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality. On the basis of the meeting's report, the Committee of Ministers had decided to set up a committee of experts on multiple nationality. The experts had already met once during the current year and their work was expected to lead to the adoption of a new legal instrument in 1990.

31. The Council of Europe had continued its activities in the environmental sphere, in particular by considering the legal consequences of threats to public health and to the environment resulting from major accidents or from discharges connected with the day-to-day operations of certain enterprises. A new committee of experts on reparation for harm to the environment was currently endeavouring to harmonize the law of civil liability through the generalization of no-fault liability in the case of operators engaged in dangerous activities, to be supplemented by the establishment of financial guarantee mechanisms in each country. The committee proposed subsequently to tackle the question of reparation for harm in cases where one or more operators could not be held responsible, such as the case of acid rain, where mechanisms outside the scope of civil liability, such as indemnification funds financed by potential polluters, had to be envisaged. Those activities were not expected to lead to the adoption of a convention, but, rather, to recommendations to Governments to incorporate certain principles in national legislation.

32. A draft agreement on responsibility for the consideration of applications for asylum had been submitted to the Committee of Ministers in 1988. However, important problems still had to be settled before that instrument could be opened for signature by member States.

33. Lastly, the committee of experts on medical research on humans had prepared a draft recommendation on the wholly new topic of bio-ethics, with the object of inviting member States to enact legislation or take other appropriate steps to give legal force to the principles annexed to the recommendation.

34. The pioneering activities of the Council of Europe in problems of criminal law had included the adoption of a recommendation concerning the liability of enterprises for offences committed in the exercise of their activities and the publication of a report on extraterritorial jurisdiction in penal matters, containing proposals designed to prevent conflicts of jurisdiction and to resolve allied difficulties.

35. The committee of experts on computer crime had continued its work, which involved analysis of the various types of computer crime (fraud, sabotage, hacking, etc.); drawing up an obligatory list and an optional list of computer-related offences which could or should be incorporated in national legislation in order to harmonize European law in that area; and examining the extent to which the European conventions on various aspects of criminal law made it possible to combat such new forms of crime in Europe and, if necessary, working out proposals to supplement those conventions. The committee had formulated principles for incorporation in the criminal legislation of member States, thereby filling a gap in existing laws and ensuring maximum concordance.

36. The select committee of experts on sexual exploitation, pornography, prostitution and the traffic in children and young adults had continued to collect data on those problems by using official statistics and research findings. It would elaborate a draft recommendation and consider the advisability of formulating a European convention on the prevention and punishment of those phenomena. The problems involved offered an opportunity for co-operation between the countries of Europe, and with other countries as well.

37. A select committee of experts on international co-operation in the detection, seizure and confiscation of criminal proceeds had begun its work in 1988. It was studying methods of depriving offenders of the proceeds of their crimes, particularly drug trafficking, and thereby making criminal activities unprofitable. A preliminary draft European convention on the subject was being elaborated, in close co-operation with the United Nations.

38. The Council of Europe, through its many activities in the legal field, was thus contributing to the evolution of law on an international scale. Although its work was done in the European context, nearly all of its achievements—its conventions, recommendations, publications and so on—were open and available to States, institutions and individuals outside the territories of its 23 member States. The Council hoped in that way to serve the entire world, so that it might become a safer, happier and more democratic place, a place more respectful of human rights and of the rule of law.

39. The CHAIRMAN said that the experience of the European Committee on Legal Co-operation in drafting legislation on liability was of direct relevance to the Commission's work. It was of particular interest that the Committee's approach emphasized aspects of liability relating to civil law, rather than State responsibility. The Commission had a long tradition of fruitful co-operation with the Committee and attached great importance to that co-operation.

40. Mr. REUTER, speaking on behalf of members of the Commission from the Western European and other States, said that the Commission had always been highly appreciative of the work of the European Committee on Legal Co-operation and was all the more so now, when the fact that Europe was destined to become a continent without borders had been thrown into relief by a number of recent events, including the profound changes and new spirit of openness in Eastern Europe. After all, what were large confederations like the United States of America and Argentina if not proof of how a European confederation might be made to work?

41. Europe was now an area of demographic depression: it operated only with the help of manpower from foreign countries, workers who initially wanted merely to make some money and return home but then grew accustomed to their host country and wished to remain. They were often prepared to take on the responsibility that went with residence in a country, yet were not always met with corresponding generosity from the country's citizens. The account just given of the European Committee's activities was highly relevant to those problems, and he thanked the Committee's Observer for it.

42. Mr. DÍAZ GONZÁLEZ, speaking also on behalf of members of the Commission from Latin-American countries, said that, as the Commission's designated participant for the current year in the work of the European Committee on Legal Co-operation, he had listened with special interest to the statement by the Committee's Observer. Many of the subjects mentioned were closely related to matters under study by the Commission. Another similarity between the two bodies was that they were both celebrating their fortieth anniversary in 1989. The Committee, like the Commission, had done highly commendable work, and it was to be hoped that it would continue in its endeavours.

43. Referring to the Committee's activities relating to refugees and émigrés, he said that the situation now was the opposite of what it had been in the past. Once it had been Latin-American States that had received numerous émigrés from Europe: Italian immigrants, for example, had helped Argentina and Venezuela prosper. Now the children of European refugees who had settled in Latin America were returning to their parents' native lands.

44. He thanked the Observer for the European Committee and expressed the hope that the co-ordination between the two bodies would continue as a means of promoting respect for the law and for democratic principles throughout the world. A Europe without borders might ultimately lead to the achievement of a world without borders.

45. Mr. BARSEGOV, speaking on behalf of members of the Commission from the Eastern European countries, thanked the Observer for the European Committee on Legal

Co-operation for a fact-filled report on the international legal aspects of the Committee's multifaceted work. Soviet jurists were studying with growing interest the Council of Europe's efforts in creating rules of law and considered the achievements of their colleagues most impressive. The Committee's emphasis on restructuring, on humanistic values and on the rule of law opened up new prospects for interaction among all of the residents of the great European house. He thanked the Committee's Observer for his outstanding report and said that he hoped the co-operation between the two bodies would continue.

46. Mr. KOROMA, speaking on behalf of members of the Commission from the African countries, expressed warm appreciation for the very interesting presentation by the Observer for the European Committee on Legal Co-operation. He agreed that the efforts being made in Europe to promote the evolution of law beyond national borders would have positive repercussions throughout the world. Africa, too, stood to benefit from those efforts, although the main trends of European legal tradition were already present on the continent and were often better preserved there than in Europe itself. It was to be hoped that the principles of reliance on the rule of law, international solidarity and humanism would continue to attend European legal development, thereby benefiting not only Europe but mankind as a whole. He expressed his thanks to the Observer for the European Committee and, through him, to all of the Commission's colleagues in that body.

47. Mr. Sreenivasa RAO, speaking on behalf of members of the Commission from the Asian countries, thanked both of the observers who had just briefed the Commission on the wide range of subjects being discussed in their organizations.

48. The activities of the European Committee on Legal Co-operation in relation to émigrés, refugees and liability would go a long way towards finding appropriate solutions to problems encountered in those areas and towards articulating policy options, not only for Europe but for all countries. It was especially interesting that not only the civil-law aspects of liability were being studied, but that prevention, co-operation and methods of compensation, including liability of potential polluters and public funding, were also areas in which the Committee was working. The Commission's endeavours could only be advanced by the Committee's efforts, and he thanked the Committee's Observer for his statement.

Draft Code of Crimes against the Peace and Security of Mankind[2] (*continued*)* (A/CN.4/411,[3] A/CN.4/419 and Add.1,[4] A/CN.4/L.433)

[Agenda item 5]

Draft articles proposed by the Drafting Committee

Articles 13, 14 and 15

49. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Committee's report, as well as draft articles 13, 14 and 15 adopted by the Committee (A/CN.4/L.433).

50. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that, in his sixth report (A/CN.4/411, part III), the Special Rapporteur had submitted a revised draft article 11 entitled "Acts constituting crimes against peace", which the Commission had referred to the Drafting Committee at its fortieth session, in 1988. The article had consisted of seven paragraphs, each dealing with a specific crime. As stated in the Commission's report on its fortieth session,[5] a consensus had taken shape within the Commission that each of the crimes was to form the subject of a separate article.

51. If all the Special Rapporteur's proposals were adopted, part I (Crimes against peace) of chapter II (Acts constituting crimes against the peace and security of mankind) of the draft code would thus comprise seven articles: on aggression; the threat of aggression; intervention; breach of obligations under treaties designed to ensure international peace and security; breach of obligations under treaties prohibiting the emplacement or testing of weapons in certain areas; subjection of a people to colonial domination or, as an alternative, to alien subjugation, domination or exploitation; and mercenarism.

52. The Drafting Committee had intended to take up all those articles at the present session and thereby complete the part on crimes against peace. Yet despite its efforts, it had not attained that goal. It could propose only three articles: article 13 (Threat of aggression), article 14 (Intervention) and article 15 (Colonial domination and other forms of alien domination). The Drafting Committee had also considered incorporating an additional article dealing with the preparation of aggression, an issue that had been discussed by the Commission in 1988.[6] Mr. Shi and Mr. Barsegov had presented a proposal suggesting the possible content of an article on the planning and preparation of aggression. After very preliminary consideration, the Drafting Committee had reached the conclusion that the matter would require more extensive examination, which would not be possible at the present session. It had therefore decided to take up that proposal at the forty-second session, in 1990. In a spirit of co-operation, the authors of the proposal had not objected to that decision.

53. The Committee had prepared articles 13, 14 and 15 in what it believed should be the standard drafting style for all the articles of chapter II of the code on specific crimes. The title of each article indicated the crime, and the text described the act which characterized the crime. For instance, article 15 was entitled "Colonial domination and other forms of alien domination": that was the crime. The text read: "Establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations." Those were the acts which characterized or constituted the crime, and that was highlighted in the French text, which began: *Le*

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* Resumed from the 2107th meeting.

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

[3] Reproduced in *Yearbook ... 1988*, vol. II (Part One).

[4] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[5] *Yearbook ... 1988*, vol. II (Part Two), p. 65, para. 277.

[6] *Ibid.*, pp. 58-59, paras. 224-228.

fait d'établir ou de maintenir . . . The same method was used in articles 13 and 14.

54. Article 12 (Aggression), provisionally adopted by the Commission at its fortieth session, in 1988,[7] had a different and more complicated structure, owing in part to the fact that the acts characterizing the crime of aggression had already been indicated by the General Assembly in the 1974 Definition of Aggression,[8] and the Commission had not wished to depart from that text, except to the extent necessitated by considerations related to the legal nature of the code. Another reason was that paragraph 1 had been introduced in article 12 only provisionally and might well disappear in the future, as stated in paragraph (1) of the commentary to the article. Hence article 12 could not be viewed as setting drafting standards for the other articles in chapter II: the Drafting Committee would have to deal in future with the question of a coherent formal presentation. Unfortunately, no time had been available to go into the matter at the present session, and the Committee had limited itself to preparing articles 13, 14 and 15 using a model which might possibly be adopted for all the articles in that chapter of the code.

ARTICLE 13 (Threat of aggression)

55. The text proposed by the Drafting Committee for article 13[9] read:

Article 13. Threat of aggression

Threat of aggression consisting of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.

56. The Drafting Committee had decided that threat of aggression, though not easy to define, should be included in the draft code, as recommended by the Special Rapporteur and in accordance with the precedent set by the 1954 draft code (art. 2, para. (2)). In drafting article 13, the Committee had been concerned, first, to describe as specifically as possible the forms that threat of aggression might take, and secondly, to distinguish between actual threats of aggression and mere verbal excesses.

57. The Committee had singled out, as possible forms of threat of aggression, declarations, in the sense of public messages in verbal or written form; communications, in the sense of expressions of intention, not broadcast publicly but contained in correspondence or orally manifested, even by telephone; and demonstrations of force, such as troop concentrations or displays of military strength. That was only an illustrative list, however, as was apparent from the words "or any other measures".

58. With regard to the distinction between an actual threat of aggression and mere verbal excesses, the phrase "which would give good reason to the Government of a State to believe" had been included to provide an objective criterion, in so far as possible, in determining whether a particular course of conduct or expression of intention amounted to a threat of aggression. Such a determination would naturally depend on the circumstances of each case and could only be made *post facto* by the judge in the light of those circumstances. The Drafting Committee none the less believed that the criterion of reasonableness served a useful purpose in that context.

59. Mr. ILLUECA said that article 13 was of particular importance for the Latin-American region, where countries were still engaged in the struggle initiated by Simón Bolívar against local despotism and foreign domination.

60. While he agreed with the purpose of the article, which was to treat threat of aggression as a separate crime, he considered that the phrase "or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State" was not satisfactory. It introduced a subjective element, so that, in the case of measures other than declarations, communications and demonstrations of force, a threat of aggression would apparently be a crime only if the State which was the object of such a threat believed that aggression against it was being prepared. The determination of the constituent elements of a crime, however, was a matter for the judge, subject to the principle *nullum crimen nulla poena sine lege*. Threat of aggression, as defined in article 13 was not to be confused with so-called indirect aggression and ideological aggression, involving hostile propaganda attacks of such magnitude as to endanger the security of the State concerned, nor with the concept of economic coercion as embodied in article 32 of the Charter of Economic Rights and Duties of States[10] and reflected in article 19 of the Charter of OAS.[11]

61. Furthermore, although the draft code was designed to apply to individuals, States should not escape responsibility for criminal acts committed by individuals acting on their behalf. It sufficed in that respect to recall article 5, paragraph 2, of the 1974 Definition of Aggression[12] and, more particularly, article 52 of the 1969 Vienna Convention on the Law of Treaties,[13] whereby:

> A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

62. Mr. McCAFFREY said that he had great difficulty with all three of the articles before the Commission (arts. 13, 14 and 15), since they did not make it at all clear for which individual actions a criminal could be indicted and punished under the code. It had been decided that individuals rather than States were to be the subjects of the code, yet article 13, for example, suggested the contrary. He therefore wondered whether a provision along the lines of paragraph 1 of article 12 (Aggression), provisionally adopted by the Commission in 1988,[14] could not be formulated for each of the three articles, or possibly a general introductory clause for part I (Crimes against peace) of chapter II of the draft.

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[7] For the text and commentary, *ibid.*, pp. 71 *et seq.*

[8] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[9] For the corresponding text (art. 11, para. 2) submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 57-58, footnote 268 and paras. 217-221.

[10] General Assembly resolution 3281 (XXIX) of 12 December 1974.

[11] 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).

[12] See footnote 8 above.

[13] United Nations, *Treaty Series*, vol. 1155, p. 331.

[14] See footnote 7 above.

63. The principle *nullum crimen nulla poena sine lege*, which called for great specificity in the drafting of criminal law provisions, must be borne constantly in mind. For instance, article 13—a vague provision in his view—could, if implemented by national courts rather than by an international court, give rise to a welter of inconsistent decisions, as could other provisions of the code, unless it was couched in very precise terms. The main problem with article 13, however, was that it did not require any specific intent to threaten aggression on the part of the alleged aggressor, whereas under most systems of penal law such intent was required, particularly for the most serious crimes such as those contemplated under the code.

64. The other difficulties stemmed from the wording of article 13. Quite apart from the fact that, in his opinion, threat of aggression was too vague an offence to be included in the code, what precisely was covered by the expression "demonstrations of force"? Did it include military exercises or war games, for example? He did not know, but it seemed to him that the article in general would lend itself to—if not actually encourage—accusations by States that another State, or an official of another State, had committed the crime of threat of aggression.

65. Lastly, under some systems of law it was possible to try an individual *in absentia*—a fact which seemed to magnify the potential for using article 13 for political or other purposes and hence to heighten the danger posed by the article itself. For instance, an official could be accused of having committed the threat of aggression, be tried *in absentia* and be sentenced, all in the name of securing some kind of political advantage. He did not think that that was what the Commission intended with respect to the code and, for that and other reasons, he was unable to accept article 13 as currently drafted. Indeed, he had serious doubts that such an article could be drafted in any way that would be acceptable in a code of crimes against the peace and security of mankind.

66. Mr. FRANCIS, agreeing with Mr. McCaffrey that article 13 was vague, said that not only article 13 but also article 14 should be fleshed out somewhat to take account of the relevant elements of the 1974 Definition of Aggression[15] and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[16] As had already been noted, one concept which was fundamental to both provisions was that of acts which constituted a threat to international peace and security. Since a threat of aggression was, from the very outset, directed against international peace and security, he would suggest that, to put teeth into article 13, the phrase "which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State" should be replaced by "which would constitute a threat to international peace and security".

67. Mr. MAHIOU said that, by comparison with article 2, paragraph (2), of the 1954 draft code, article 13 undeniably represented progress, for it was important to pin-point in precise terms those elements—declarations, communications and demonstrations of force—which would enable a threat of aggression to be identified. The words "or any other measures" had, of course, been included to avoid too narrow a definition, but were qualified by the requirement that there must be good reason to believe that aggression was being seriously contemplated. One point of concern, however, was that, under the terms of the article, it would be left to the Government of a State which believed that aggression was being contemplated against it to determine whether there was a threat of aggression. As Mr. McCaffrey had observed, it was the intent of the State that was the subject of such a threat, rather than that of the State that made the threat, which seemed to matter according to the present wording. That was a point the Chairman of the Drafting Committee might wish to clarify.

68. In any event, he wondered whether it was necessary to retain the words "to the Government of a State", which were not only restrictive in that they limited the requirement of intent to the Government of a State which believed it was threatened, but could also give rise on that account to problems of interpretation. It might perhaps be advisable to find some more general form of wording which would avoid any reference to the intent of the State threatened and would provide simply for an objective determination of certain acts and measures. Accordingly, he would suggest that the words "to the Government of a State" be deleted and that the words "that State", at the end of article 13, be replaced by "a State".

69. Mr. OGISO said that he wished to enter a reservation with respect to article 13. Notwithstanding the introductory remarks by the Chairman of the Drafting Committee, he was not convinced that it was appropriate to include in the draft code a separate provision on threat of aggression, particularly before the Commission had decided the question of an international criminal jurisdiction.

70. Two hypothetical cases could be considered. The first was a threat of aggression followed by actual aggression. Obviously, in such a case, the individual who committed the crime of aggression would be punished for that crime and would receive the most severe penalty. Even if he was further punishable for the separate crime of threat of aggression, the penalty would not be greater than for the aggression.

71. The second case was that in which an individual committed the crime of threat of aggression but did not carry out an act of aggression. Under the draft code, such an individual would be subject to punishment even though no act of aggression had occurred. But it must be remembered that an individual who committed the crime of threat of aggression did not expressly state, in declarations or communications, that he would commit aggression. In the second case, therefore, situations would probably arise in which certain acts of a State, such as military exercises or warning declarations directed at another State, were regarded as a threat of aggression. Sometimes, of course, warning declarations or communications were made or military exercises were carried out to discourage another State from committing a politically undesirable act, and it might not always be easy to differentiate between a threat of aggression and a legitimate act of warning. Theoretically, it might be possible to punish an individual for a crime of threat of aggression separately from a crime of actual ag-

[15] See footnote 8 above.

[16] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

gression. However, if the State to which the warning was addressed interpreted it as a threat of aggression and insisted that such act be punished, the political dispute might escalate.

72. Lastly, he considered that it was for an international criminal court to decide whether there had been a threat of aggression. National courts were not the appropriate forum for such a decision.

The meeting rose at 1 p.m.

2135th MEETING

Wednesday, 12 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/411,[2] A/CN.4/419 and Add.1,[3] A/CN.4/L.433)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 13 (Threat of aggression)[4] (*concluded*)

1. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), noting that several members had doubts about article 13, said that the Drafting Committee had no set opinion in the matter and considered that it had performed its task, which was not to consider the need for a particular article but to draft a text.

2. Mr. AL-QAYSI said that article 13 was necessary, since it completed article 12, which the Commission had provisionally adopted at the previous session[5] and which defined aggression as a crime against the peace and security of mankind. The proposed text was perhaps the best solution the Drafting Committee could produce. Admittedly, the concept of "threat" was not easy to define, but in the present case it was a matter of defining "threat of aggression", a far more specific expression.

3. His answer to the question whether article 13 was acceptable was in the affirmative, inasmuch as it established a relationship with the concept of aggression, as already defined. The Drafting Committee had none the less allowed a subjective element to remain, as reflected in the phrase "which would give good reason to the Government of a State to believe that aggression is being seriously contemplated". That involved an element of intent on the part not of the State, but of its Government, which was composed of individuals. That was in fact an extension of the criminal responsibility of individuals, which was the essence of the draft code.

4. The object of the article was to define a process of thinking which led to concrete facts, in which connection it had already been said that it approached the matter solely from the standpoint of the threatened State, not from that of the State which made the threat. It thus provided for an escape route, which could be dangerous.

5. Mr. Francis (2134th meeting, para. 66) had proposed that the qualifying clause "which would give good reason to the Government of a State to believe . . ." should be deleted and the reasons he had cited merited consideration. Such an amendment would, however, at the same time have the effect of removing the material element constituted by the reaction of the threatened State. In that case, only the Security Council would be in a position to determine whether or not there had been a threat of aggression.

6. For all those reasons, he considered that, for the time being, it would be best to accept article 13 as proposed by the Drafting Committee and to include in the commentary an explanation of the details of its provisions in order to leave no doubt as to its meaning. In particular, it should be stressed that the article must be read in conjunction with article 12.

7. Mr. BENNOUNA said that, in his view, the text of article 13 proposed by the Drafting Committee had the fewest drawbacks. In any event, it was an improvement over the 1954 draft in that the Drafting Committee had tried to arrive at a definition which was as objective as possible.

8. Contrary to what had been said, there was no question of leaving it to the Government of a State to determine whether or not it was threatened, since the requirement introduced by the words "which would give good reason to the Government of a State to believe . . ." enabled third parties to decide whether or not "declarations, communications, demonstrations of force . . ." constituted a threat.

9. Mr. Reuter had wanted to go further and add the concept of blackmail to that of intent. It was true that a threat was always designed to obtain something, for example a certain conduct on the part of the State that was threatened. Although the Drafting Committee had decided not to endorse that idea, a reference to blackmail might perhaps be included in the commentary, something which could only enhance the content of article 13.

10. Mr. McCaffrey (2134th meeting) had wondered whether intent was adequately represented in the concept of threat. The wording of article 13 left no doubt on that score, but in the interests of clarity a qualification could

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] For the text, see 2134th meeting, para. 55.

[5] *Yearbook . . . 1988*, vol. II (Part Two), pp. 71-72.

be added, for example by saying "which would *intentionally* give good reason to the Government of a State to believe . . .".

11. Mr. BEESLEY, stressing the importance of article 13, said that threat of aggression could not be excluded, since it could have many practical implications. A powerful State could, for example, achieve its objectives without actually committing aggression. Thus, in cases where there was no actual military action, such a State—and therefore the individuals who directed it—would be exempt from blame, and that was precisely what had to be avoided. The situation was similar to preparation of aggression. Indeed, some national systems of law also differentiated between the threat and the act itself, as, for example, in the distinction between assault and battery.

12. In the case of threat, intent had to be present. If it were left to the victim to determine intent, however, a problem would arise with regard to third States, which could also take action on the basis of such threats. A more objective criterion should therefore be incorporated in article 13 to replace the phrase "which would give good reason . . . to believe", which seemed to be unduly subjective.

13. However, he did not think that any solution would be the right one. Acceptance of the text proposed by the Drafting Committee might be a source of uncertainty, yet rejection of it would pave the way for misleading interpretations.

14. Mr. Sreenivasa RAO said that the main problem with regard to article 13 was one of application, which ideally should be entrusted to an international court, since the difficulties would begin as soon as a national court had to determine whether there had been a threat of aggression. In some instances, as had been the case with the Nazi Government's preparations for war, the threat was fairly easy to determine. Recent history, however, revealed situations which were far more involved and called for a determination by a third party. Threat was essentially subjective and there were many ways of bringing it into play: it was enough to recall, for example, the gunboat politics of yore. Depending on individual judgment, the threat might or might not be seen as genuine. Once the Security Council was entrusted with the task of determining whether there had been a threat, the situation became much clearer.

15. Whether or not it was applied, however, article 13 was in keeping with the ultimate objective of the code, which was prevention. In his view, therefore, the text should remain as drafted and the reservations voiced by members should be reflected in the commentary. It must be recognized that the Commission had not altogether achieved the objective sought.

16. Mr. RAZAFINDRALAMBO said he agreed in principle that the text proposed by the Drafting Committee should be adopted and he appreciated the difficulties in that connection. As already noted, however, the text was still imbued with subjectivity. Were "declarations", for instance, enough to characterize a threat of aggression? That subjective element would acquire still greater significance if article 13 were applied by national courts. The subjective elements in the definition should therefore be supported by more specific elements: other concrete elements such as "military preparations" could be added to the "demonstrations of force" already referred to in the article.

17. As to drafting, the phrase "which would give good reason to the Government of a State to believe . . ." suggested that it qualified only "other measures". It should therefore be amended accordingly.

18. Mr. BARSEGOV said that, in deciding whether or not article 13 was necessary, it must be borne in mind that threat of aggression was a reality, that it was a reprehensible act of State, and that the future code should therefore provide for sanctions against individuals guilty of it.

19. Several members had already said that the proposed text was woolly. That was due to the approach peculiar to the Drafting Committee, which avoided being too specific and sought solutions that were as general as possible. There were, therefore, gaps in the text: for instance, it made no direct reference to the Charter of the United Nations or to the Security Council, whose role in the matter would be decisive. Indeed, the decision of the Security Council would be even more important in the case of threat than in that of actual aggression, since aggression was all too evident.

20. Mr. Sreenivasa Rao had said that, even if article 13 was not applied, it would retain its deterrent character, which would be in keeping with the spirit of the code. In any event, it was conceivable that in practice there would be an overall pronouncement on various aspects of the general situation, such as threat, preparations and actual acts of aggression.

21. As to the court which would have jurisdiction, he was prepared to envisage the establishment of an international criminal court, as indeed the Commission had promised to do. For the time being, he considered that the text, though not perfect, should be accepted as drafted and that efforts should be made to improve it gradually on the basis of all the views that would be expressed on it.

22. Mr. THIAM (Special Rapporteur) said he was surprised that some members questioned the need for the code to include threat of aggression, which was expressly referred to in Article 2, paragraph 4, of the Charter of the United Nations and which the Commission was consequently bound to deal with. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[6] which had been adopted unanimously, also contained a number of provisions proscribing threat of aggression. Furthermore, in its judgment in the *Nicaragua* case,[7] the ICJ had held that threat of aggression was included among crimes against the peace and security of mankind, even if it was a less serious crime.

23. The problem could be approached in two ways, either by referring to threat without defining it and leaving it to the court to determine the facts—as was the method under internal law—or, as advocated by those who adopted a restrictive approach to the draft code, by enumerating the various possible forms of threat. The Drafting Committee and he, in his capacity as Special Rapporteur, had endeav-

[6] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[7] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits*, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14.

oured to give satisfaction to those who favoured the second solution. It was not the time for reopening the debate, but rather for making specific proposals if members so wished.

24. Mr. KOROMA suggested that, in the case of the draft code, the Commission should follow the method adopted at the present session during the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, when the Special Rapporteur had been invited to comment on each article after it had been introduced by the Chairman of the Drafting Committee. It would also be helpful if the Chairman of the Drafting Committee and the Special Rapporteur could intervene in the discussion more frequently to provide explanations, which would shorten the debate. However, since it had taken nearly 20 years to formulate the definition of aggression, it was not surprising that the definition of threat of aggression was being discussed at length. Indeed, he welcomed the detailed analysis to which the Drafting Committee's work had given rise, but would invite the Special Rapporteur to draft a commentary to article 13 which was as comprehensive as possible.

25. Article 13 was not perfect, of course, but in the circumstances it was satisfactory. It should be read in the light of the Charter of the United Nations and of the historical context, in other words in the light of the development of the law on the prohibition of the use of force and of article 19 of part 1 of the draft articles on State responsibility.[8] Threat of aggression was unfortunately a reality, which had in the past already had the effects anticipated by the States concerned. The draft code should not remain silent in that regard.

26. When it came to crimes such as threat of aggression, it was pointless to stipulate that specific damage must have occurred: it sufficed to establish the existence of an objective intent in order for threat of aggression to be made an international crime. In other words, it was enough for a State to perceive the threat of aggression against it for that State to have grounds for complaint.

27. Threat of aggression could be imputed both to an individual and to a State, even if, for the time being, only acts attributable to individuals fell under the code. An introductory clause should, however, be inserted before articles 13 *et seq.*, to read: "The following crimes constitute a threat against the peace".

28. With regard to a point made by Mr. Francis at the previous meeting, there was a difference between article 19 of part 1 of the draft articles on State responsibility, which he had already mentioned, and article 13 under consideration. Article 19 laid down an *erga omnes* rule and, if applied in the present case, an *erga omnes* rule would mean that not only the threatened State, but any member or collective body of the international community could allege that an international obligation had been violated. In the case of article 13 the position was different, since it was for the victim to make the allegation.

29. The text before the Commission was, for the time being, the best the Drafting Committee could produce. Nevertheless, an extensive commentary was needed in view of the observations and criticisms to which it had given rise. The Commission could try to improve the article on second reading, or even at a later stage.

30. Mr. TOMUSCHAT said that the Drafting Committee had done its very best to produce a reasonable text that could be implemented, although the text did call for some improvement. The Drafting Committee believed, for instance, that it had introduced a sufficiently objective element into article 13 with the words "which would give good reason", since they would mean that determination of the facts was not left to the threatened State alone. Given the number of members of the Commission who had criticized the subjective character of the article, however, the text might need some strengthening.

31. It had rightly been said that some link should be established between article 12 (Aggression), provisionally adopted at the previous session,[9] and article 13. In particular, the Commission should not exclude the role of the Security Council, whose decisions should have binding force, as provided in paragraph 5 of article 12. A similar provision would be required in article 13.

32. Article 13 was one of the provisions in the draft code that could not be applied by national courts. It was therefore comforting to note an emerging consensus on the idea of establishing an international criminal court to try crimes like the threat of aggression. Two categories of crimes were covered by the draft code, one consisting of crimes in the more or less traditional sense of the term, such as war crimes, where individual acts were at issue, and the other requiring an analysis of a complex historical situation involving a whole pattern of acts which national courts were not in a position to determine. That was why an international criminal court must be established at all costs.

33. Mr. BARBOZA said that he appreciated the difficulties of the Drafting Committee, which had merely performed the task entrusted to it by the Commission. An article on the threat of aggression had its place in the draft code for the reasons given by the Special Rapporteur. Moreover, although aggression as such was the most serious of the crimes against peace, the fact remained that, generally, when a criminal code was drawn up, a legal interest was enveloped in a series of protective rings. In the present case, the legal interest was peace, and aggression and threat of aggression were the evils against which it had to be protected. In general, national criminal codes prohibited the mere possession of weapons even if they were not used to commit a crime and, in so doing, they strengthened protection against the actual crime. In the present case, threat of aggression was one of the additional elements in an even more serious crime against which the international community wished to protect itself.

34. Obviously, it was more difficult to discern intent in some cases than in others. The problem was the same, however, in that intent to commit a crime had to be inferred from the facts. The wording of article 13 proposed by the Drafting Committee was not bad: it could perhaps be amended slightly, but it was sufficiently objective. Whether there was in fact a threat of aggression had to be inferred from the general context in which it occurred,

[8] See 2096th meeting, footnote 19.

[9] See footnote 5 above.

namely from a set of circumstances that would provide the court having jurisdiction with an idea of the intent involved.

35. He, too, considered that threat of aggression, and indeed other crimes covered by the draft code, such as aggression itself and genocide, could not be tried by national courts. Yet the fact that that question had still not been settled was no reason for not having an article on the threat of aggression, the inclusion of which would strengthen the educational and illustrative value of the code.

36. The text itself should, in his view, be cast in more "dramatic" terms and should refer, for example, to "serious" rather than "good" reason and to the "imminence" of the aggression.

37. Mr. ARANGIO-RUIZ said that the arguments put forward in support of article 13 were convincing, since the article was wholly in keeping with the Charter of the United Nations, which prohibited not only the use of force, but also threat of the use of force. The adoption of such an article was, however, an added reason for dealing with the statute of an international criminal court as soon as possible. The draft code would become a living reality in international law only if there were a means of implementation other than national courts, which could provide the solution only in the case of war crimes in the narrow sense of the term, namely in cases of violation of the law of land, sea and air warfare. For all other crimes covered by the code, whether they were crimes against peace—which included the threat of aggression—or against mankind, an international court would be essential. He would lay particular emphasis on the point, as he had the impression that many members shared that view.

38. Although it was not easy to improve the drafting of article 13, some terms, which were rather weak, should be re-examined. For instance, the words "good reason" could perhaps be replaced by "sufficient reason", which would be more objective. Also, what was to be understood by the expression "seriously contemplated"? It would be better to speak of a "planned" threat, which would bring out more sharply the reality of the threat.

39. Mr. THIAM (Special Rapporteur), noting the concern members had again expressed with respect to the court having jurisdiction in the matter, said that, while he intended to submit a draft statute for an international criminal court to the Commission, he first had to deal with the crimes. It was precisely to prevent possible mistakes by national courts that he had endeavoured, with the Drafting Committee's assistance, to determine as precisely as possible the various constituent elements of threat of aggression. In that way, if in the end national courts had to apply the code, they would know which specific elements had to be borne in mind in determining whether there was a threat of aggression.

40. As to the remarks made about the author of the act, he had started by defining the acts but would later concentrate on establishing the link between the act, as defined, and the author of the act. In any event, the author could only be an individual, since the topic did not cover the criminal responsibility of the State. Individuals, inasmuch as they committed crimes against peace, were usually, if not always, persons vested with political power. The Commission would see later how that aspect of the matter was to be reflected in the draft code. The 1954 draft code had referred to the authorities of the State, an expression which had attracted criticism from a number of members. For the time being, it was enough to know that the code would apply to individuals and that, in the case of crimes against peace, it could only apply to individuals vested with the authority of the State.

41. Mr. McCAFFREY observed that the main argument put forward by the Special Rapporteur and other members in support of article 13 derived from the fact that threat of aggression was prohibited under, in particular, the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.[10] The Commission could not, however, reproduce at random in the code all the elements which appeared in the applicable international instruments. It had to make a choice on the basis of the seriousness of the acts and of how the code would be implemented. Leaving aside the question of the seriousness of the acts—threat of aggression was undoubtedly a serious act—and concentrating on the question of the implementation of the code, it was difficult to imagine that States could entrust to national courts the task of determining whether a threat of aggression had occurred unless that crime was defined with great precision and objectivity. The text proposed by the Drafting Committee failed on that score, for it laid down a general definition which would perhaps suffice for the Security Council or an international criminal court but certainly not for national courts. He would in fact favour an express reference in article 13 to the role of the Security Council, although that role might not always be decisive.

42. While some members were not opposed to including an article on threat of aggression, most of them had serious reservations about the text of article 13 proposed by the Drafting Committee. How then could that text be referred to the General Assembly as a text coming from the Commission? The best solution would probably be to state in the Commission's report, and not just in the summary records, that the Drafting Committee had proposed an article on threat of aggression to the Commission—the text of which would be reproduced in a footnote—and that the discussion in the Commission had been inconclusive and would be resumed at the next session.

43. Mr. REUTER said he considered that an article on threat of aggression was necessary. Also, he could support the text of article 13 proposed by the Drafting Committee, on the understanding that the expression "Government of a State" was taken to mean "any responsible Government of a State", in other words a Government that appreciated the seriousness of its task.

44. Mr. JACOVIDES said that the best course in the circumstances would be to leave article 13 as proposed by the Drafting Committee, subject to possible reconsideration in the context of the draft code as a whole. Whatever the differences about the need for and the wording of the article, the fact remained that the Charter of the United Nations made express reference to threat of aggression.

45. He attached importance to the expression "good reason", which he interpreted as referring not only to the opinion of the threatened State, but also to objective criteria,

[10] See footnote 6 above.

and considered that an international criminal court should determine whether a threat of aggression had occurred.

46. Mr. EIRIKSSON said that, although he too believed that an article on threat of aggression was necessary, he considered that the text proposed by the Drafting Committee could lead to confusion. Was it trying to define threat of aggression or to establish thresholds—in hierarchical order, apparently—beyond which threat of aggression would be covered by the draft code? For his own part, he discerned two thresholds in article 13, one as reflected by the supposedly objective criterion of "good reason" and the other by the words "seriously contemplated". Like other members, he had reservations about both expressions.

47. In his opinion, the article on threat of aggression should be viewed in the context of the confidence-building measures that were familiar to the Conference on Security and Co-operation in Europe, and it should be designed to prevent any possibility of anticipatory self-defence. For that reason, and to remove any impression that the acts constituting threat of aggression were graded in any way, article 13 could be worded as follows:

> "Threat of aggression consisting of any measure, including declarations, communications and demonstrations of force, which would give good reason for a State to believe that aggression is being seriously contemplated against that State."

48. Mr. THIAM (Special Rapporteur), noting that the Commission had discussed the matter thoroughly, said that interesting proposals had been made to improve the text of article 13 proposed by the Drafting Committee, but almost all members seemed to agree on the need for an article on threat of aggression. His intention was to reflect all those drafting proposals in the commentary to the article, something which would assist the Commission at the second-reading stage.

49. He was none the less concerned at the attitude of some members to the draft code as a whole. In the first place, it was at the request of the General Assembly that the Commission had resumed work on the topic, and that decision should be respected. Secondly, if only one member of the Commission had to oppose a particular text in order for it not to be transmitted to the Sixth Committee of the General Assembly, the Commission would never refer anything to the Sixth Committee again. The code was what it was; it might or might not be acceptable, but the Commission must fulfil the mandate it had received from the General Assembly.

50. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) noted that the discussion centred on two main questions, namely jurisdiction (i.e. national courts or an international criminal court), and the relationship between the acts of the State and the responsibility of individuals. Those two questions, however, arose in connection with other articles in the draft code and certainly could not be resolved by the Drafting Committee in the context of article 13.

51. In response to Mr. Barsegov's point, he explained that the need for article 13 was a matter for the Commission to decide, not the Drafting Committee, which was only a subsidiary body. The Drafting Committee had worked on an article on threat of aggression because it had believed that that was the wish of the Commission.

52. With regard to Mr. Razafindralambo's point, it was not only the "other measures", but also the declarations, communications and demonstrations of force which must "give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State". That was clear from the text of the article, but the Special Rapporteur might wish to confirm it in the commentary.

53. In short, there were relatively few proposals for change. Mr. Eiriksson's suggestion (para. 47 above) might have been useful during the Drafting Committee's consideration of the article, but in any case it was not essential and might have some flaws. With regard to Mr. Mahiou's concern (2134th meeting) that the Government of the potential victim State might have too dominant a role in determining whether threat of aggression had occurred, logic dictated that it should be the State which felt threatened that made the allegations of threat of aggression. It would then be for the court having jurisdiction to decide whether that was, or was not, the case. If the State concerned did not itself feel threatened, it would seem difficult to hold that the crime of threat of aggression had occurred. As to Mr. McCaffrey's suggestion, it would further delay the work of the Commission. Moreover, it was very unlikely that, at the Commission's next session, the Drafting Committee would be able to submit a text that differed significantly from the one under consideration. No doubt article 13 was far from perfect and should be carefully reviewed, perhaps at a third-reading stage, which, in the particular case of the code, seemed advisable. For the time being, however, the article could be adopted as drafted.

54. Mr. BEESLEY suggested, in the light of the various proposals, that reference should be made in a footnote to the role of the Security Council—although the Special Rapporteur was probably thinking of doing that. Also, he would suggest—without dwelling on the point—that article 13 be amended to read:

> "Threat of aggression, including declarations, communications, demonstrations of force or any other measures threatening aggression."

55. The CHAIRMAN said that, in his view, the discussion had been necessary, for it had shown that the Commission was well aware of the inevitable problems and difficulties of substance and drafting, that article 13 must be read in conjunction with the other articles in the draft code, and that the question of the introductory clause still had to be settled. He therefore recommended that the Commission should adopt article 13 as proposed by the Drafting Committee and that the commentary should state that the article would be reviewed in the light of the observations made in the Sixth Committee of the General Assembly and of the articles outstanding in the same chapter.

56. Mr. ARANGIO-RUIZ reiterated that he could agree to article 13 only if a statute for an international criminal court was envisaged.

57. Mr. FRANCIS, stressing that the threat of aggression endangered international peace and security, proposed that the phrase "which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State" be placed between square brackets for the time being. There was nothing unusual about that proposal and it was his intention

to submit amendments to article 13 at the Commission's next session.

58. Mr. McCAFFREY said that he was not opposed to the Chairman's recommended course of action, provided the commentary reflected the fact that article 13 had given rise to serious reservations on the part of many members.

59. The CHAIRMAN noted that the Special Rapporteur had already stated that those reservations would be reflected in the commentary.

60. Mr. BENNOUNA pointed out that there was a difference between the Commission's report, which reflected the views of members, and the commentaries to articles, which were a collective interpretation of the texts adopted. To refer to reservations in a commentary could only lead to confusion.

61. The CHAIRMAN, noting that Mr. Francis did not insist on his proposal, said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 13 as proposed by the Drafting Committee, on the understanding that the commentary would indicate that the article would be examined further in the light of the observations made by Governments in the Sixth Committee of the General Assembly and of the articles outstanding in the same chapter.

It was so agreed.

Article 13 was adopted.

ARTICLE 14 (Intervention)

62. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 14,[11] which read:

Article 14. Intervention

1. Intervention in the internal or external affairs of a State by fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.

2. Nothing in this article shall in any way prejudice the right of peoples to self-determination in accordance with the Charter of the United Nations.

63. The text proposed by the Drafting Committee for paragraph 1 of article 14 combined elements taken from each of the two alternatives submitted by the Special Rapporteur. Like the first alternative, it included the element of impairment of the sovereign rights of a State—which the ICJ, in its judgment in the *Nicaragua* case,[12] had deemed to be an essential element of intervention; and, like the second, it spelt out which concrete acts amounted to intervention. The formula "Intervention in the internal or external affairs of a State" already appeared in those two alternatives as well as in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States[13] (third principle).

64. Members would recall that, in the second alternative, the Special Rapporteur had followed the model of the 1954 draft code and, in two separate subparagraphs, had singled out as acts of intervention "civil strife or any other form of internal disturbance or unrest", on the one hand, and terrorist activities, on the other. The text proposed by the Drafting Committee dealt in a single sentence with armed subversive or terrorist activities. In that connection, the Drafting Committee had based itself on the third principle (second paragraph) of the 1970 Declaration, which provided that no State "shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State". The Committee had thought it preferable, however, to refer to "subversive activities" rather than to "civil strife or any other form of internal disturbance or unrest"; in its opinion, the concept of subversion was more comprehensive and more appropriate for the purposes of article 14.

65. The Drafting Committee had been careful to retain only those acts whose gravity warranted inclusion in the code as crimes against peace. That was why some members of the Committee had supported the inclusion of the word "armed" before "subversive or terrorist activities", although others had taken the view that any subversive activity which resulted in impairment of the sovereign rights of States should be regarded as a crime against peace, whether or not it involved the use of armed force. The word "armed" had therefore been placed between square brackets. The word "seriously" had likewise been placed between square brackets to reflect another divergence of views.

66. Paragraph 2, which was in the nature of a saving clause and was based on article 7 of the 1974 Definition of Aggression,[14] was self-explanatory. Its placement in article 14 was provisional, since a similar clause might prove necessary in relation to other crimes against peace. Lastly, members would note the difference between the last part of paragraph 2 and the similar wording at the end of article 15. It might be useful to harmonize the texts, but the Special Rapporteur felt that that should be done after article 15 had been considered.

67. Mr. MAHIOU said that the word "armed" should be deleted so that paragraph 1 did not duplicate paragraph 4 (*g*) of article 12 (Aggression) already provisionally adopted by the Commission.[15] The word "seriously" was necessary to qualify intervention and should be retained.

68. Mr. McCAFFREY said that he had already expressed serious reservations about article 14 when it had been considered in the Drafting Committee and he did not think it should have a place in the code. Although the Drafting Committee had improved the text, the crime of intervention was still not defined sufficiently precisely for the purposes of implementation of the article by national courts or indeed by an international court.

69. Furthermore, he did not understand what was meant by "intervention in . . . external affairs". Even if that kind of intervention existed, he wondered whether it could be sufficiently serious to be included among "the most serious

[11] For the corresponding text (art. 11, para. 3) submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 59 *et seq.*, footnote 276 and paras. 231-255.

[12] See footnote 7 above.

[13] See footnote 6 above.

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

[15] See footnote 5 above.

of the most serious" crimes. Moreover, because the code should include the most serious crimes, the word "armed" ought to be retained, for the concept of subversive activities was too subjective unless it was qualified. A State might very well argue, for instance, that making a contribution to a political party in opposition amounted to intervention.

70. With regard to Mr. Mahiou's point, he did not think that paragraph 1 of article 14 could duplicate paragraph 4 (*g*) of article 12, which dealt with a different situation, namely the sending of armed bands or groups by a State. The word "seriously" should be retained, first of all because the forms of intervention involved were the most serious and also because, strictly speaking, the word "undermining" was not a legal term and should therefore be clarified.

71. He welcomed the introduction of a saving clause in paragraph 2, although he would have preferred a reference to human rights. In that connection, he noted that, in a recent article, Lori Fisler Damrosch had concluded, after studying State practice in the matter, that:

> . . . a State violates the non-intervention norm when its non-forcible political activities prevent the people of another State from exercising the political rights and freedoms that form part of the evolving body of international human rights law.[16]

If that was true, the converse must also be true, and non-forcible political activities which enabled a people to exercise those freedoms and rights should not be regarded as constituting intervention.

72. Mr. HAYES said that he favoured deletion of the word "armed", because subversive activities—in the sense of unconstitutional activities—might not be armed. He was also in favour of omitting the word "seriously", because there were no degrees when it came to undermining the free exercise of the sovereign rights of a State and the word might provide an escape clause for those who perpetrated the crime of intervention. Furthermore, it would be preferable to replace the word "undermining", at the end of paragraph 1, by the words "with the purpose of undermining", for in its present form the text suggested that the activities covered could be sanctioned only if they actually resulted in undermining the free exercise of the State's sovereign rights. Such activities should, however, be sanctioned even if they did not have the expected effect. The objection that a reference to the purpose would provide those charged with the crime of intervention with an escape clause was not well founded, since it would be for the court to take a decision in each case, and the judge could take intent into account. In principle, a person who committed an act was assumed to intend the normal consequences of that act.

73. Mr. ARANGIO-RUIZ said that he recognized the importance of the concept of intervention and appreciated the work done by the Special Rapporteur and the Drafting Committee. He was, however, still too perplexed by the wording of article 14 to be able to comment on it and therefore reserved his position until the second reading of the article.

74. Mr. BENNOUNA said that examples of intervention in external affairs were to be found in State practice, although only some countries were in a position to engage in that kind of intervention, the object of which was to make a State change its international policy. He had in mind, for example, what had taken place in the Mediterranean in connection with the delimitation of the maritime zone of a State, and the activities conducted against the diplomats and representatives of a State to make it alter its policy.

75. He, too, favoured deletion of the two sets of square brackets in paragraph 1 of article 14.

76. Mr. AL-QAYSI said he considered that the words "armed" and "seriously" in paragraph 1 should be deleted, and endorsed Mr. Hayes's suggestion that the word "undermining" should be replaced by the words "with the purpose of undermining". Also, to limit the risk of abuse, it would perhaps be advisable to indicate in the commentary that the "free" exercise of the sovereign rights of a State must be taken to mean "in accordance with international law".

77. Mr. Sreenivasa RAO said that he supported the proposal to delete the words "armed" and "seriously", for the reasons already stated. He also agreed with Mr. Al-Qaysi's suggestion regarding the word "free".

78. Mr. TOMUSCHAT said that the word "armed" should be retained, since the word "subversive" had no legal meaning. Freedom of speech, for instance, was sometimes regarded as subversive, and deletion of the word "armed" would open the door to violations of the most elementary principles of human rights. The word "seriously" was also necessary, at least in the French text: the expression *porter atteinte* was not enough, as there could be different degrees of *atteinte*.

79. Mr. FRANCIS said that he favoured deletion of both of the words between square brackets. Free exercise of the sovereign rights of a State was the quintessence of the existence of a State and anything that might impair it should be regarded as serious. No condition, therefore, should be laid down with respect to the means, namely "armed", or the result, namely "seriously", of undermining such free exercise.

80. At the previous meeting (para. 66), he had pointed out that there was a missing element in article 13, to which Mr. Reuter had referred in the general debate. He thought in that connection, and independently of the position taken by Mr. Reuter, that the Commission should consider adding the words "and endangering international peace and security" at the end of paragraph 1 of article 14. Any act from an external source which undermined the free exercise of the sovereign rights of a State threatened international peace and security. If, in addition, external relations could also be affected, a threat to international peace and security would seem to be an essential component of article 14.

81. Mr. THIAM (Special Rapporteur) said that all the crimes covered by the draft code were included precisely because they were a threat to international peace and security. There did not seem any point in recalling that fact in article 14.

82. He had used the word "armed" because it appeared in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among

[16] L. Fisler Damrosch, "Politics across borders: Non-intervention and non-forcible influence over domestic affairs", *American Journal of International Law* (Washington, D.C.), vol. 83, No. 1 (January 1989), p. 6.

States.[17] He was not, however, opposed to deleting it, for he was fully aware that activities did not need to be "armed" in order to be "subversive". In Africa, for instance, there had been a case of a State using the national radio to incite the population of a neighbouring State to rebellion. The best course would perhaps be to leave the word between square brackets and let the Sixth Committee of the General Assembly decide the matter.

83. With regard to the word "seriously", he would point out that the ICJ, in its judgment in the *Nicaragua* case,[18] had held that coercion was a criterion in determining whether intervention had occurred. Did that mean coercion of any kind, or should its seriousness be taken into account? He had no preference in that connection.

84. Mr. RAZAFINDRALAMBO said that he, too, favoured deletion of the words "armed" and "seriously". Since some members would prefer to retain them, however, the best course would perhaps be to leave them between square brackets. As for paragraph 2, the last part should be brought into line with the last part of article 15.

85. Mr. AL-BAHARNA said that the words "armed" and "seriously" should be retained and the square brackets deleted. The concept of subversion was lacking in legal precision and the difference in nature between the 1970 Declaration on Principles of International Law and the draft code also had to be borne in mind. Furthermore, as he had pointed out in the Drafting Committee, the expression "intervention in . . . external affairs" should be clarified, for instance in the commentary, since it reflected a concept that was not very clear. Lastly, he agreed that the end of paragraph 2 of article 14 should be brought into line with the end of article 15.

86. Mr. ILLUECA said that he agreed with those members who were in favour of deleting the word "armed".

87. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he noted from the discussion that there was no strong objection to the text of article 14 proposed by the Drafting Committee. Personally he would have liked to delete either the square brackets or the words placed between them, but there was apparently no change in the positions in that respect. The decision with regard to a possible amendment to the end of paragraph 2 could be taken when article 15 was considered.

88. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 14 as proposed by the Drafting Committee.

Article 14 was adopted.[19]

The meeting rose at 1.05 p.m.

[17] See footnote 6 above.

[18] See footnote 7 above.

[19] See 2136th meeting, paras. 28-41.

2136th MEETING

Thursday, 13 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*concluded*) (A/CN.4/411,[2] A/CN.4/419 and Add.1,[3] A/CN.4/L.433)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

ARTICLE 15 (Colonial domination and other forms of alien domination)

1. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 15,[4] which read:

Article 15. Colonial domination and other forms of alien domination

Establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations.

2. Colonial domination had been the subject of the first alternative submitted by the Special Rapporteur and alien subjugation, domination or exploitation the subject of the second. The Drafting Committee had agreed, however, that article 15 should deal not only with colonial domination, but also with other forms of domination in the modern world.

3. The first limb of the article was the "establishment or maintenance by force of colonial domination", a phrase which appeared in article 19 of part 1 of the draft articles on State responsibility[5] (para. 3 (*b*)). In the Drafting Committee's view, the notion of "establishment or maintenance by force of colonial domination" had acquired a sufficiently precise legal content in United Nations practice to warrant inclusion as a crime under the code.

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[4] For the corresponding text (art. 11, para. 6) submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 63-64, footnote 294 and paras. 262-267.

[5] See 2096th meeting, footnote 19.

4. The second limb was "any other form of alien domination", an expression which had the advantage of being all-embracing and of ruling out restrictive *a contrario* interpretations. It would be made clear in the commentary that it encompassed the concept of "alien occupation" in so far as the latter was not already covered by paragraph 4 (*a*) of article 12 (Aggression), provisionally adopted by the Commission at the previous session.[6]

5. The Drafting Committee further considered that the scope of the notion of foreign domination, which was somewhat elusive, should be narrowed, first, by linking it to the denial of the right of peoples to self-determination—again on the basis of paragraph 3 (*b*) of article 19 on State responsibility—and secondly, by defining the content of that right by reference to the Charter of the United Nations. The words "as enshrined in the Charter of the United Nations" made it clear that the right of peoples to self-determination pre-dated—and might even exist outside—the Charter.

6. Lastly, he would suggest that, if the Commission adopted article 15, the same form of language—"as enshrined in"—should be used in paragraph 2 of article 14, provisionally adopted at the previous meeting.

7. Mr. ILLUECA said that, while he agreed with the content of article 15, which laid down an essential legal principle, he noted a certain inconsistency between the English text, which used the expression "contrary to" in reference to the right of peoples to self-determination, and the Spanish and French texts, which used the expressions *en violación* and *en violation* (in violation of). Moreover, the Special Rapporteur had explained that the word "colonialism" was a political term which had no legal significance; that was why he had replaced it by the expression "colonial domination", which now appeared in article 15. At the outset of the discussion on the draft code, however, some members had also proposed that the word "colonialism" should be replaced by "violation of the right to self-determination". Although that proposal had not been accepted—the words "maintenance by force of colonial domination or any other form of alien domination" being used in the article instead—the words "contrary to the right of peoples to self-determination" none the less now appeared in the article alongside the expression "colonial domination". His concern was that the juxtaposition of those two expressions, which in his view were synonymous, could expose the article to the absurd interpretation that the crime of colonial domination would be punishable only if it were committed in violation of the right to self-determination. For those reasons, he considered that it would be preferable to replace the words "contrary to" by "because it is a violation of" (*por ser una* ... in Spanish). Colonial domination in all its forms and manifestations would then be punishable under article 15 where such domination constituted a denial of human rights, was contrary to the Charter of the United Nations and was prejudicial to the cause of world peace and co-operation.

8. Many United Nations and other declarations recognized the right of peoples to self-determination and the corresponding duty of States to respect that right, but he would draw attention in particular to Principle VIII (Equal rights and self-determination of peoples) contained in the Helsinki Final Act of 1 August 1975,[7] which stated:

...

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

...

9. By a happy coincidence, article 15 was being considered on the eve of the two-hundredth anniversary of the French Revolution. That Revolution, which had left a deep imprint on all freedom-loving peoples, had had an influence both on Latin-American emancipation from colonialism and on the anti-colonialist revolution of the twentieth century. For the Commission to agree on the anniversary of that epoch-making event that colonial domination should be treated as an international crime would be a tribute to the French people and to French values. It would also be a contribution to the Commission's work to promote recognition of the equal and inalienable rights of all members of the human family.

10. Mr. McCAFFREY said that, as one who had consistently expressed reservations about the use of the term "colonialism", he believed that the Commission would be better advised to focus on contemporary manifestations of that phenomenon rather than use a term that was charged with emotion and bore very little relation to what was going on in the modern world. Such contemporary manifestations could take the form, for instance, of the subjection of peoples to alien subjugation, domination and exploitation, as stated in paragraph 1 of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples,[8] or of the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind, as stated in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[9] (third principle, second paragraph). By contrast with the provisions of those Declarations, the terms of article 15 were very weak and seemed to shrink from recognition of the real problems that existed in the contemporary world.

11. He also believed that article 15 should refer to human rights, as did the 1960 Declaration, since they were as important in the modern world as was the denial of self-determination. Such a reference could easily be added by inserting the words "fundamental human rights and" after the words "contrary to".

12. He agreed with the suggestion by the Chairman of the Drafting Committee (para. 6 above) that the words "as enshrined in the Charter of the United Nations" should also appear in paragraph 2 of article 14.

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[6] *Yearbook ... 1988*, vol. II (Part Two), pp. 71-72.

[7] See the Declaration on Principles Guiding Relations between Participating States contained in the chapter of the Final Act on "Questions relating to security in Europe" (*Final Act of the Conference on Security and Co-operation in Europe* (Lausanne, Imprimeries Réunies, [n.d.]), pp. 77 *et seq.*, sect. 1 (*a*)).

[8] General Assembly resolution 1514 (XV) of 14 December 1960.

[9] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

13. Mr. TOMUSCHAT said that, in his opinion, article 15 was a good provision. It had always been his view that the draft articles should be narrow in scope, and every effort had been made to achieve that object. He also considered that the words "alien domination" were appropriate, since he assumed that they were merely a shortened form of the expression "alien subjugation, domination and exploitation" contained in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. The numerous General Assembly resolutions which had been adopted over the past five years and in which violation of the prohibition of the use of force was mentioned alongside violation of the right of peoples to self-determination were enough to show how often article 15 would apply in the future.

14. He did not share the view of those who preferred the words "as enshrined in" to "in accordance with". The principle of self-determination as originally laid down in the Charter of the United Nations was very weak and had only been strengthened in the course of time, first by the General Assembly in the 1960 Declaration mentioned above and in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, and then by the ICJ, which had affirmed the existence of a genuine right of self-determination in its advisory opinions in the *Namibia* case[10] and the *Western Sahara* case.[11] It would therefore be preferable to speak of the right to self-determination "in accordance with" the Charter, since that reflected the present state of the law.

15. Mr. DÍAZ GONZÁLEZ said that, as a member of the Drafting Committee, he naturally agreed with the content of article 15. Certain remarks had, however, been made and he could not allow them to be passed over in silence.

16. In the first place, it had been said that colonialism was no longer a real problem in the modern world. Nothing could be further from the truth. The twentieth century had recently witnessed a colonial war waged by one of the major world Powers, with all the technological resources at its disposal, against a Latin-American people struggling to recover their territory. In Latin America, therefore, as in other parts of the world, colonialism was very much a reality and not just an emotional concept.

17. Furthermore, he did not agree that the words "as enshrined in the Charter of the United Nations" should be discarded. Self-determination was not a principle but a right, and a right laid down not only in the Charter, but also in a number of General Assembly resolutions, including the Declaration on the Granting of Independence to Colonial Countries and Peoples. The wording of article 15, which had been the subject of lengthy discussion in the Drafting Committee, should be retained.

18. Mr. REUTER said that article 15 was a compromise article agreed on by the Drafting Committee and, as such, required no further comment.

19. Mr. Illueca had, however, paid tribute, on the eve of 14 July, to the French Revolution, which had been a major event in the history of France and indeed of the world. While he thanked Mr. Illueca for his thought, he felt obliged, as a Frenchman, to add one small rider, for although France was entitled to take pride in the Revolution, he would point out that revolutions also gave birth to tyrants. It was particularly regrettable that slavery, though abolished under the French Revolution, had been restored fairly rapidly by a tyrant and had not been finally abolished in France until 1848—11 years after its abolition by England.

20. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 15 reflected in a few words concepts that were more or less universally accepted and, as drafted, was in his opinion a good article. The introduction of the concept of exploitation instead of alien domination, for instance, could have caused difficulty, since the term "exploitation" was sometimes used in a very wide sense.

21. While Mr. Illueca had certainly raised a valid point with which all members would agree, he did not think that any wording could be found to express that point more clearly than the phrase "or any other form of alien domination contrary to the right of peoples to self-determination". In the circumstances, he would suggest that the point be clarified in the commentary.

22. Mr. McCaffrey had suggested that the article should refer to human rights. It was a matter of settled humanitarian law, however, that violation of the human rights of individual members of a people was implicit in the violation of the collective right of that people to self-determination. But the former was a second-tier violation and, as such, need not be mentioned in the article.

23. Mr. ILLUECA said that the suggestion by the Chairman of the Drafting Committee that the point he had raised should be clarified in the commentary was acceptable.

24. Mr. THIAM (Special Rapporteur) said that article 15 embodied the two elements which had previously been the subject of two alternative provisions he had submitted. The first of those elements was condemnation of colonial domination in its traditional form, which, contrary to what had been suggested, had not disappeared. It had to be remembered, moreover, that the expression "establishment or maintenance by force of colonial domination" had been used in article 19 of part 1 of the draft articles on State responsibility.[12] The Commission could not adopt a certain expression only to reject it a few years later on the ground that the phenomenon in question had disappeared.

25. The second element in article 15 was condemnation of what some members of the Drafting Committee had termed "neo-colonialism". Yet that term could not be used in a legal text and the wording of the Declaration on the Granting of Independence to Colonial Countries and Peoples, which covered not only the traditional form of colonialism but also other forms of alien domination, had therefore been used.

26. Mr. EIRIKSSON said that he supported article 15 and its commendable economy of language. In his view, the link between alien domination and the right of peoples to self-determination was essential, given the vagueness of the expression "alien domination". He also agreed that "colonial

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[10] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 16

[11] Advisory Opinion of 16 October 1975, *I.C.J. Reports 1975*, p. 12.

[12] See 2096th meeting, footnote 19.

domination", though perhaps an outdated concept, was the appropriate expression.

27. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 15 as proposed by the Drafting Committee.

Article 15 was adopted.

28. The CHAIRMAN asked whether the Commission also wished, as suggested by the Chairman of the Drafting Committee (para. 6 above), to replace the words "in accordance with", in paragraph 2 of article 14 as provisionally adopted at the previous meeting, by "as enshrined in".

29. Mr. KOROMA said he supported that suggestion, but also considered that Mr. Tomuschat's very interesting point should perhaps be considered further at an appropriate time.

30. Mr. EIRIKSSON said that he, too, agreed with the suggestion made by the Chairman of the Drafting Committee. It would none the less seem that Mr. Tomuschat's point was concerned not so much with the difference between the expressions "as enshrined in" and "in accordance with" as with the need to expand the scope of certain terms in the Charter of the United Nations.

31. Mr. McCAFFREY suggested that the Special Rapporteur might wish to explain in the commentary that the words "enshrined in the Charter of the United Nations" were used not in the sense in which they had originally been used in that instrument, but rather in the sense in which the right of self-determination was currently interpreted and as it had developed since the Charter had been adopted. To cite an example, the "due process" clause under the Constitution of the United States of America had not perhaps at the outset had the importance it had since acquired.

32. Mr. FRANCIS said that he supported the proposal by the Chairman of the Drafting Committee. Mr. Tomuschat had raised an important point, but not everyone would attach the same authority to General Assembly resolutions. Article 15 must be understood, as Mr. McCaffrey had suggested, from the standpoint of the current state of international law in the United Nations system. He favoured the expression "as enshrined in" because it conveyed the "sanctity" conferred by the development of the law.

33. Mr. AL-QAYSI said that he did not endorse the proposal by the Chairman of the Drafting Committee. As the substance of article 14 was essentially dynamic, the phrase "in accordance with" was entirely appropriate there, but the words "as enshrined in" were more suitable in article 15, which was mainly conceptual in nature. He would, however, be guided by the will of the Commission.

34. Mr. Sreenivasa RAO said that he agreed with the proposal by the Chairman of the Drafting Committee and also with Mr. Koroma's suggestion that the point raised by Mr. Tomuschat should be discussed further.

35. Mr. TOMUSCHAT suggested that a sentence be incorporated in the commentary to indicate that the expression "as enshrined in" referred to the state of the law today, and should not be construed by using the meaning given during an earlier historical period to the right to self-determination. The Chairman of the Drafting Committee was right to propose that article 14 should be brought into line with article 15.

36. Mr. THIAM (Special Rapporteur), replying to Mr. McCaffrey's request for a sentence in the commentary explaining the use of the expression "as enshrined in", recalled that self-determination had been expressly mentioned among the purposes of the United Nations in Article 1, paragraph 2, of the Charter. As to the choice between the expressions "in accordance with" and "as enshrined in", he did not believe there was a substantive difference, and thought it was merely a question of nuance. He had no objection to the suggestion that article 14 should be aligned with article 15, but such alignments were not desirable in all cases: the Commission should not make a practice of it. Lastly, he undertook to reflect Mr. Tomuschat's comment in the commentary.

37. Mr. DÍAZ GONZÁLEZ said that he would oppose incorporation of Mr. Tomuschat's comment in the commentary. While it was true that slavery had, to all intents and purposes, been abolished, colonialism still existed in the world today.

38. Mr. BARSEGOV said that he did not endorse the proposal by the Chairman of the Drafting Committee and did not believe Mr. Tomuschat's comment should be reflected in the commentary. The right to self-determination was essentially the same now as it had originally been: it had two aspects, external and domestic, which had been reflected in many instruments, including the Helsinki Final Act. No one denied that that right had become better defined over time, but the elaborate counter-position of historical understanding to contemporary conceptions would create more problems than it solved.

39. Mr. HAYES said that he endorsed the proposal by the Chairman of the Drafting Committee. When they had been trying to decide on the wording for article 15, members of the Drafting Committee had been greatly concerned not to link the right to self-determination exclusively to its appearance in the Charter of the United Nations: it was important not to exclude the way in which it had developed since, or imply that it had not existed before, the adoption of the Charter.

40. He, too, wished to congratulate Mr. Reuter as France prepared to celebrate the anniversary of its Revolution. The French Revolution had probably affected no country more deeply than it had Ireland, whose strivings for independence had been inspired and sustained by the French example.

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend paragraph 2 of article 14 as provisionally adopted at the 2135th meeting (para. 88), as suggested by the Chairman of the Drafting Committee (para. 6 above), by replacing the words "in accordance with" by "as enshrined in", it being understood that the expression "as enshrined in" referred to the right of peoples to self-determination as it existed in international law today.

It was so agreed.

Draft article 16

42. The CHAIRMAN invited the Chairman of the Drafting Committee to report on the Committee's consideration of draft article 16, which it had not been able to complete.

43. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that paragraphs 4 and 5 of the revised draft article 11 referred to the Drafting Committee in 1988 (see 2134th meeting, para. 50)[13] had stipulated that breaches of certain treaty obligations were crimes under the code.

44. Paragraph 4 had spoken of a breach of the obligations of a State under a treaty "designed to ensure international peace and security, in particular by means of: (i) prohibition of armaments, disarmament, or restriction or limitation of armaments; (ii) restrictions on military training or on strategic structures or any other restrictions of the same character". The source of the paragraph had been article 2, paragraph (7), of the 1954 draft code. "Prohibition of armaments" and "disarmament" had been added to "restrictions or limitations on armaments", which had been placed in the singular—"restriction or limitation"—and the words "strategic structures" had replaced the word "fortifications". Paragraph 5 had referred to a breach of obligations under a treaty "prohibiting the emplacement or testing of weapons in certain territories or in outer space".

45. Early on, the Drafting Committee had come to the conclusion that, if they were both retained, paragraphs 4 and 5 should be combined in a single article, as had been suggested at the previous session. After long discussions, the Committee had seemed prepared, despite the reservations of some members, to agree that such an article should be included in the draft code in order to deal with breaches of obligations deriving from certain treaties, on the understanding that: the breach should be a serious breach; the obligation violated should be one of essential importance for the maintenance of international peace and security; the obligation should be in the field of disarmament, arms control or arms prohibition; and restrictions on military preparation or installations, prohibition of the emplacement or testing of weapons and prohibition of the manufacture of certain types of weapons should all be mentioned.

46. The Drafting Committee had been well aware that any breach of any obligation of essential importance for the maintenance of international peace and security could be characterized as a crime against peace under the code. The purpose of draft article 16 would be a limited one, however. The article should cover only breaches of treaty obligations, and only in the field of disarmament, in other words those concerning "disarmament, arms control or arms prohibition", with some examples being given to underline matters which, for the purpose of the code, should be included in that field. Breaches of other obligations, either treaty or non-treaty obligations, would not come within the scope of the article and would be covered by other provisions, the principal example being aggression.

47. He believed it would have been possible for the Drafting Committee to have agreed on a text along the lines he had just mentioned. The article none the less raised some very essential questions, which would subsist no matter how adequate the indication of the obligations whose breach constituted a crime under the code. Reference had already been made to those questions at the previous session. As the Commission had stated in its report on that session:

> Some members stressed that care should be taken to ensure that States not parties to a treaty on the maintenance of peace and security should not be placed in an advantageous position in relation to States which signed such a treaty. One member, in particular, pointed out that, if a State had adopted wide-ranging disarmament measures well beyond what other States were ready to agree to, the agents of that State should not incur international responsibility for a breach of its commitments. According to another opinion, paragraph 4 should not provide encouragement to a potential aggressor or give the impression that the inherent right of self-defence under the Charter of the United Nations was being impaired.[14]

48. The Drafting Committee had felt that those questions should be addressed, and that to that effect a second paragraph was necessary. The Special Rapporteur and members of the Committee, either individually or in small *ad hoc* drafting groups, had worked on a number of proposals which had been thoroughly considered by the Committee. They had dealt essentially with the situation which would arise when a State, bound by a treaty, deemed it had to take measures that could be considered as breaches of the treaty in preparation for self-defence against another State not bound by the treaty, and they had involved matters related to the law of treaties and international responsibility. Near the end of its work, the Drafting Committee had been considering a text for the second paragraph which had sought to synthesize the elements contained in several proposals. It had read:

> "The provisions of paragraph 1 are without prejudice to any measure of self-defence taken by a State bound by the treaties referred to in paragraph 1 against a State not bound by those treaties and shall be construed in conformity with the general rules of the law of treaties and State responsibility."

49. It had been recognized that that text was not entirely satisfactory and that further clarifications were necessary. Under pressure of time, the Drafting Committee had come to the conclusion that draft article 16 should not be submitted to the Commission at present and that the issues involved should be looked into again at the next session. It had been suggested that the Commission itself might wish to re-examine the issues in plenary before the Drafting Committee took them up again.

50. The Drafting Committee had also had before it a proposal for a third paragraph for article 16, reading:

> "A State Party to this Code cannot invoke the breach of obligations by another State under a treaty to which the former State is not itself a party."

It had been possible to give only preliminary consideration to that proposal, which should also be more fully examined at the next session.

51. Mr. BENNOUNA said he fully agreed that, at its next session, the Commission must hold a serious and thoroughgoing discussion in plenary on draft article 16, which was among the most difficult in the entire draft, as well as on the advisability of including such an article in the code.

52. Mr. THIAM (Special Rapporteur) said that there had been broad agreement in the Drafting Committee on the advisability of incorporating such an article. He did not believe a discussion in plenary would be productive and

[13] For the texts of paragraphs 4 and 5 and a summary of the Commission's discussion on them at its previous session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 62-63, footnote 289 and paras. 256-261.

[14] *Ibid.*, p. 63, para. 259.

thought it would be better for the Drafting Committee to continue to try to solve the outstanding problems, which were primarily of a drafting nature.

53. Mr. McCAFFREY said he took issue with the Special Rapporteur's statement that article 16 had generated majority support in the Drafting Committee. Like Mr. Bennouna, he believed a full discussion of the article in plenary was necessary before the Drafting Committee could resume its work on it.

54. Mr. KOROMA said that the Commission was entering into a substantive discussion, which would be better carried out when it took up the matter at the next session. He proposed that coverage of the discussion be expunged from the summary record.

55. Mr. BARSEGOV said he agreed with the Special Rapporteur that the Drafting Committee should continue its work on the article at the next session: a discussion in plenary would only slow down progress.

56. Mr. BARBOZA said that it was for the Drafting Committee to decide whether or not its work could be furthered by a debate in plenary.

57. Mr. BEESLEY said that he would like to know from the Chairman of the Drafting Committee whether it had been lack of time alone, and not active opposition by a number of members, that had prevented the Drafting Committee from reaching agreement on article 16.

58. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that, in his introduction, he had stated that "after long discussions, the Committee had seemed prepared, despite the reservations of some members, to agree that such an article should be included in the draft code" (para. 45 above).

59. Mr. TOMUSCHAT said that the present discussion was extremely useful and he would oppose Mr. Koroma's proposal that coverage of it be expunged from the summary record.

60. Mr. REUTER said that he fully endorsed the comments made by Mr. Barsegov and the Special Rapporteur.

61. Mr. AL-QAYSI said that he could not agree to Mr. Koroma's proposal.

62. The CHAIRMAN suggested that the Commission should take note of the report by the Chairman of the Drafting Committee on the Committee's consideration of draft article 16, and that only a brief account of the ensuing debate should be incorporated in the summary record of the present meeting.

It was so agreed.

63. The CHAIRMAN said that sincere thanks were due to the Chairman of the Drafting Committee, the members of the Committee and the secretariat for all the intensive and productive work they had done during the session.

64. Mr. KOROMA said that he, too, wished to pay tribute to the Chairman of the Drafting Committee and the secretariat, without whose support not nearly as much work would have been accomplished.

The meeting rose at 11.30 a.m.

2137th MEETING

Friday, 14 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Bicentenary of the French Revolution

1. The CHAIRMAN said that the celebration of the bicentenary of the French Revolution of 1789 was an important event, not only for France, but for the entire world, including the international community of lawyers, in which the Commission must be in the vanguard. The Revolution had been a decisive stage in world history and had also accelerated the process of human emancipation; no one today would dispute the influence it had had on the progressive development of international law. The Commission was privileged to have with it, in the person of Mr. Reuter—the doyen and most experienced of its members—a perfect incarnation of the virtues and spirit of that Revolution.

2. Mr. REUTER thanked the Chairman and pointed out that, at an earlier meeting, he had emphasized the limitations of the French Revolution by noting that it had taken the doctrine of human rights and the ideal of a more just and peaceful world from America, from what had then been an English colony. Like other countries, France had not always acted well in the course of its history, and that was why French patriotism should remain humble and respectful of the homelands of others. The horrifying ordeals of world history had left him personally without any hate whatsoever in his heart: it was in that spirit that each individual could celebrate the 14th of July in perfect equality, perfect liberty and perfect fraternity.

Draft report of the Commission on the work of its forty-first session

3. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter VI.

CHAPTER VI. ***Jurisdictional immunities of States and their property*** (A/CN.4/L.439 and Add.1 and 2)

A. Introduction (A/CN.4/L.439)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

Paragraph 4 was adopted subject to a correction in footnote 2 bis.

Paragraph 5

4. Mr. McCAFFREY proposed that the word "presented", in the third sentence, should be replaced by "introduced" and that the words "on their basis", in the fourth sentence, should be replaced by "on the basis thereof".

It was so agreed.

Paragraph 5, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.439 and Add.1 and 2)

Paragraphs 6 to 80 (A/CN.4/L.439)

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

Paragraph 8

5. Mr. McCAFFREY suggested that the phrase "their second reading . . . those made by some members", in the third sentence, should be replaced by "consideration in the light of the comments made", for it was not the Drafting Committee but the Commission that would consider the texts on second reading.

6. Mr. CALERO RODRIGUES pointed out that, if that was the case, then the sentence could end after the phrase "for their second reading".

7. The CHAIRMAN proposed that the fourth and fifth sentences should be deleted: the fifth sentence attributed to him a view that properly was that of the Commission.

It was so agreed.

Paragraph 8, as amended, was adopted.

Paragraph 9

8. Mr. EIRIKSSON pointed out that the beginning of the second sentence was ambiguous and might give the impression that the "draft articles" were draft articles 12 to 28, mentioned in the first sentence.

9. Mr. MAHIOU endorsed that remark and suggested transposing the first sentence of paragraph 9 to the end of paragraph 8.

It was so agreed.

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

10. Mr. McCAFFREY proposed that the word "entity", in the second sentence, should be replaced by "status".

It was so agreed.

Paragraph 11, as amended, was adopted.

Paragraph 12

Paragraph 12 was adopted.

Paragraph 13

11. Mr. BARSEGOV said he was afraid that the phrase "on the basis of the brief analysis of State practice from the nineteenth century to the present period", in the first sentence, might create the impression that only the Special Rapporteur's conclusion was well founded and that the views of members who did not agree with him were not. Hence he would suggest that that phrase be deleted.

12. Mr. McCAFFREY said he thought that the remainder of paragraph 13 gave an appropriate account of the views of members who did not agree with the Special Rapporteur's conclusion and of the reasons for those views. He had no objection to the text being amended, but believed that the deletion proposed by Mr. Barsegov would create an imbalance that did not exist in the text as currently worded.

13. Mr. OGISO (Special Rapporteur) said that he had striven to reflect as faithfully as possible the observations made by members of the Commission during the discussion. While he had stated that, in his opinion, recent State practice reflected a trend towards restriction of immunity, he had also indicated that some members had disagreed, and he had stated their reasons. He therefore believed he had set out both points of view in a balanced manner, and he was reluctant, at the present stage, to amend the text.

14. Mr. AL-QAYSI said that he endorsed the remarks made by Mr. McCaffrey and the Special Rapporteur. Paragraph 13 reflected the discussion correctly and the proposed deletion would introduce an imbalance.

15. Mr. MAHIOU said that one solution might be to replace the words "State practice" by "the practice of certain States".

16. Mr. BARSEGOV said it was obvious from the discussion that he had misinterpreted the text of paragraph 13: he would therefore withdraw his proposal.

17. Mr. KOROMA said that he endorsed Mr. Mahiou's suggestion. He would not request that paragraph 13 be revised at the current late stage, but it was unfortunate that it implied that the Commission had still not resolved the old and purely theoretical conflict between absolute immunity and restricted immunity. He would also suggest that the words "in Western Europe", in the second sentence, be deleted, for the decisions referred to had not all been taken by national courts in that area of the world.

18. Mr. CALERO RODRIGUES said that he supported Mr. Koroma's proposal.

19. Mr. BENNOUNA (Rapporteur) said that he endorsed the comments made by the Special Rapporteur, and believed the draft report gave a very faithful account of the discussion.

20. Mr. BARSEGOV said that he could accept paragraph 13 as it stood if the word "the", before the words "brief analysis" in the first sentence, were replaced by "his".

21. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 13 as amended by Mr. Mahiou, Mr. Koroma and Mr. Barsegov (paras. 15, 17 and 20 above).

It was so agreed.

Paragraph 13, as amended, was adopted.

Paragraph 14

Paragraph 14 was adopted.

Paragraph 15

22. Mr. THIAM suggested that, for strictly stylistic reasons, the words "intended to stress the fact", in the first sentence, should be deleted.

It was so agreed.

Paragraph 15, as amended, was adopted.

Paragraph 16

23. Mr. AL-QAYSI said he wondered whether it was necessary to indicate that the Commission had been able to complete its consideration of only part of the draft articles, since two documents on the articles had been submitted to it.

24. Mr. BARSEGOV recalled that the Commission had decided to examine only articles 1 to 11 and to defer consideration of articles 12 to 28 until its next session. That was why, like many of his colleagues, he had refrained from speaking on articles 12 to 28. The draft report, however, summarized the views of those who had chosen to speak on the second set of articles as well as on the first set, and the debate as represented in the report was not complete. He would like that to be made perfectly clear, and proposed that the following sentence should be added to paragraph 16: "The report does not reflect the opinions of those members who did not speak on draft articles 12 to 28."

25. The CHAIRMAN suggested that a more objective formulation might be: "The report reflects only the opinions of those members who had the opportunity to speak on articles 12 to 28".

26. Mr. McCAFFREY said that he endorsed Mr. Barsegov's comment, for he, too, had refrained from speaking on articles 12 to 28. It might be better to refer in the report only to the Special Rapporteur's comments on the observations received from Governments.

27. Mr. FRANCIS said that he also endorsed the comment made by Mr. Barsegov and would propose adding the following sentence to paragraph 16: "Many members deliberately did not speak on articles 12 to 28." The words "Due to lack of time", in the second sentence, were not in line with what had really happened.

28. Mr. KOROMA said that, if the phrase "Due to lack of time" were retained, it should be transposed to the beginning of the last sentence.

29. Mr. DÍAZ GONZÁLEZ said it was unfortunate that the draft report gave the impression that the Commission was resubmitting to the General Assembly the comments made by Member States on the draft articles.

30. Mr. BENNOUNA (Rapporteur) replied that the report clearly indicated that the consideration of articles 12 to 28 had not been concluded, and that the General Assembly did not have the entire draft before it. It had been decided to postpone consideration of articles 12 to 28 to the next session: in the mean time, the report merely gave an account of the discussion in the Commission on the conclusions drawn by the Special Rapporteur from the comments and observations of Governments.

31. Mr. OGISO (Special Rapporteur) proposed that the second sentence of paragraph 16 should be amended to read: "Due to lack of time, some members were not able to express their views fully and, therefore, articles 12 to 28 were not referred to the Drafting Committee."

32. Mr. Sreenivasa RAO said that, in order to meet the concern expressed by Mr. Barsegov, it would be sufficient to indicate, at the end of the last sentence of paragraph 16, that articles 12 to 28 ". . . remain to be further discussed".

33. Mr. THIAM said it was not a good idea to stress that some members of the Commission had been unable to speak "due to lack of time", thereby giving the impression that all members of the Commission were always required to take the floor on each and every topic. In reality, many preferred not to do so because their colleagues had expressed what they themselves would have stated. The Commission was composed of a great many more members than in the past, and anything in paragraph 16 that might make the reader think that each member had to give his opinion on everything should be deleted.

34. Mr. CALERO RODRIGUES said that, if the idea to be conveyed was that the report did not reflect the opinions of all members on articles 12 to 28, the last sentence of paragraph 16 could be reformulated as follows: "Articles 12 to 28, as well as the related proposals . . . were therefore not fully discussed, as indicated in paragraph 8, and the present report does not reflect the views of all members."

35. Mr. EIRIKSSON said he could endorse that proposal as long as the words "Due to lack of time", in the second sentence, which were no longer necessary because of the reference to paragraph 8, were deleted.

36. Mr. AL-QAYSI said that paragraph 16 seemed merely to repeat the decision referred to at the end of paragraph 8, as amended (see para. 9 above).

37. Mr. BENNOUNA (Rapporteur) pointed to the content of paragraph 8, which had already been adopted, and proposed that the last two sentences of paragraph 16 be replaced by the formulation: "Since the Commission was unable thoroughly to examine articles 12 to 28, the present report does not reflect the opinions of all the members of the Commission on those articles."

38. Mr. BARSEGOV, supported by Mr. KOROMA and Mr. AL-BAHARNA, said the Commission should simply say that it had not had the opportunity to complete its consideration of the draft articles before it, because it was true that some members had not had the time to express their views. He proposed that, in the sentence suggested by the Rapporteur, the word "thoroughly" should be deleted, as the Commission had purely and simply stopped its work on the matter for the time being.

39. Mr. McCAFFREY suggested that the words "thoroughly to examine articles 12 to 28", in the sentence proposed by the Rapporteur, should be replaced by "to complete its consideration of articles 12 to 28".

40. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 16 as amended by the Rapporteur and Mr. McCaffrey (paras. 37 and 39 above).

It was so agreed.

Paragraph 16, as amended, was adopted.

41. Mr. EIRIKSSON said that, before continuing its consideration of the draft report, the Commission should give some thought to ways of reducing its length. For example, it was unnecessary to reproduce the texts of the draft articles. Again, the section entitled "Summary of comments and observations of Governments", which was repeated in connection with each article, was inappropriate, because it seemed to imply that the Commission was repeating to delegations to the Sixth Committee of the General Assembly what it had been told by their Governments.

42. Mr. FRANCIS said he shared that view, although he also believed that drawing attention to the comments and observations of Governments had the merit of reminding the reader what the discussion had actually been about. If only to reduce documentation, however, it was a practice not to be encouraged and should be avoided in the future.

43. Mr. OGISO (Special Rapporteur) said that his second report (A/CN.4/422 and Add.1) had essentially been devoted to the comments and observations of Governments, and it was on that basis that the Commission had discussed the topic. It therefore seemed important that the Sixth Committee should be informed about those comments, the Special Rapporteur's analysis of them and the opinions expressed within the Commission. Since some delegations to the Sixth Committee would certainly be aware of what Governments had had to say on the draft articles, it would probably be simpler just to refer to the documents in which those observations were to be found, but the format used in the draft report had the advantage of offering the reader an overview of the various issues discussed.

44. Mr. McCAFFREY said that the paragraphs in the draft report which followed the heading "Summary of comments and observations of Governments" were really summaries not of what Governments had said, but of what the Special Rapporteur thought about their comments. He would therefore propose that the heading be amended to read: "Response of the Special Rapporteur to the comments and observations of Governments".

45. Mr. BENNOUNA (Rapporteur) said that the format used in the draft report was perfectly clear and in any case it was too late to change it. It might be useful in the future for the special rapporteurs and the Rapporteur to decide on a uniform structure at the beginning of the session.

46. In reply to Mr. McCaffrey, he said that the most accurate way to refer to the part of the draft report in question was not as the Special Rapporteur's analysis of comments and observations of Governments, but as the Commission's discussion of that analysis. The best formulation might simply be: "Comments and observations of Governments".

47. Mr. EIRIKSSON said that the report was well structured, but a clear distinction had to be drawn between what members of the Commission had said, what the Special Rapporteur had said and what Governments had said.

48. Mr. RAZAFINDRALAMBO said he thought that a more concise format could have been adopted: the texts of the draft articles might have been incorporated in footnotes, for example. It might also have been possible to do without the headings, thereby making it clear that the entire text came from the Commission. While it was useful to recall the comments of Governments, it must be made clear that they had only been the subject-matter considered by the Commission and that the summary was only a sort of introduction to the paragraphs in which they were analysed. The headings could thus be deleted.

49. Mr. CALERO RODRIGUES said that there were many ways of chronicling the Commission's discussions, and the one that had been adopted was by no means the worst. It had the merit of setting out the material in full. He believed it should remain unchanged, although the headings should be amended as suggested by Mr. McCaffrey.

50. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the following wording for the heading appearing after each of the draft articles in chapter VI of its report: "Response of the Special Rapporteur to the comments and observations of Governments".

It was so agreed.

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

51. Mr. McCAFFREY proposed that, in the first sentence of the English text, the preterite should be changed to the pluperfect, and that the same change should be made whenever the report referred to comments received from Governments.

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 18 *bis*

52. Mr. OGISO (Special Rapporteur) said that the following sentence should be added at the end of the paragraph: "A further drafting proposal was made by one member that the expression 'one State' should be replaced by 'a foreign State' and the expression 'another State' by 'a forum State'."

Paragraph 18 bis, *as amended, was adopted.*

53. Mr. FRANCIS said that he had serious reservations about paragraph 18. The conclusions the Commission drew from the comments and observations of Governments were material to its consideration of a topic. The Commission was paying too much attention to questions of marginal interest and lingering over problems of presentation. The two sentences that made up paragraph 18 should in fact have been incorporated in paragraph 18 *bis*.

54. Mr. KOROMA said that he endorsed the comments made by Mr. Francis. Once the Commission had accepted the views of the Special Rapporteur, they became its own views, and it would be dangerous to draw a distinction between the Special Rapporteur's opinions and those of the Commission. In subscribing to the Special Rapporteur's point of view, the Commission gave him a kind of protective shield. It would not be judicious to create the impression that the Special Rapporteur's opinions took precedence over those of a particular Government, for example.

55. Mr. DÍAZ GONZÁLEZ said that he agreed with Mr. Francis and Mr. Koroma. The Special Rapporteur's opinions on the comments of Governments, which were formulated at the Commission's request, were naturally of the greatest importance, but it was not the reports of special rapporteurs that the Commission sent to the Sixth Committee of the General Assembly: it sent its own decisions. The Commission's report should not convey the impression that it was sending the Special Rapporteur's opinions to the Sixth Committee to be discussed in the light of observations made by members of the Commission.

56. Mr. BENNOUNA (Rapporteur) said that the Special Rapporteur had sought to describe the discussion in the Commission as thoroughly and as accurately as possible.

Since the Commission seemed reluctant to use the heading "Response of the Special Rapporteur to the comments and observations of Governments", the best course might be to delete all the headings, which were not indispensable.

57. Mr. AL-BAHARNA said that the heading in question, as amended (para. 50 above), should be retained.

58. Mr. OGISO (Special Rapporteur) said that he had no objection to the headings being deleted.

59. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the headings throughout section B of chapter VI.

It was so agreed.

Paragraphs 19 to 21

Paragraphs 19 to 21 were adopted.

Paragraph 22

60. Mr. McCAFFREY said that, in the second sentence, the word "constituents", should be replaced by the words "the constituent parts", and the comma and the word "and", after the letter "(*c*)", should be replaced by a semi-colon.

It was so agreed.

61. Mr. KOROMA said he thought that the expression "segregated State property", in the second sentence, should be placed in quotation marks.

It was so agreed.

Paragraph 22, as amended, was adopted.

Paragraphs 23 to 26

Paragraphs 23 to 26 were adopted.

Paragraph 27

62. Mr. RAZAFINDRALAMBO proposed that the words "referred to section 3 of the State Immunity Act of Australia as a useful guide", in the second sentence, should be replaced by "mentioned that section 3 of Australia's *Foreign States Immunities Act 1985* could usefully serve as a guide".

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraph 28

63. Mr. OGISO (Special Rapporteur) proposed that the second sentence should end with the words "in that subparagraph", the remainder of the paragraph to read as follows: "One member, noting that the component States ... application of present subparagraph (*b*) (ii), stated that he preferred . . .".

64. Mr. BARSEGOV said that, if he had understood correctly, the Special Rapporteur's proposal was designed to correct an inaccuracy. In his own statement during the consideration of the matter, he had associated himself with the comments of a number of Governments, including the Australian Government. With regard to the reasons for granting all the component States of a federal State the same immunity the federal State enjoyed, other members of the Commission had also been of the opinion that, in view of the definition of the term "State", it would be appropriate to insert in article 2 provisions to guarantee the protection of component States by granting them the status of a State. Naturally, such problems would be solved as a function of the constitution of each federal State, but the question was an extremely important one for a country like the Soviet Union, whose component republics played a role in the international arena.

65. Mr. MAHIOU said that the amendment proposed by the Special Rapporteur only made the French text obscure: it was no longer very clear who had suggested that the wording of subparagraph (*b*) (ii) be revised. Perhaps the proposal should be redrafted to make the meaning clearer in English and in French.

66. Mr. AL-BAHARNA said that the amended third sentence proposed by the Special Rapporteur was too long and it would be preferable to divide it into two by breaking it up after the words "application of present subparagraph (*b*) (ii)". The next sentence would begin with the words : "He therefore preferred . . .".

67. Mr. OGISO (Special Rapporteur) said that he could accept the sub-amendment proposed by Mr. Al-Baharna and pointed out that Mr. Barsegov's position was reflected in the first part of the second sentence, where it was stated that "several members supported the suggestion made by one Government . . .". The second part of that sentence reflected what had been said by Mr. Tomuschat, for which reason it had seemed preferable to him to divide the sentence into two.

68. Mr. BARSEGOV said that it could nevertheless be made clear that several members had supported the suggestion made by one Government concerning the protection of the component States of federal States.

69. Mr. OGISO (Special Rapporteur) drew attention to the first sentence of paragraph 28, which said that many members had considered that the definition of the term "State" in paragraph 1 (*b*) of the new draft article 2 required a thorough review. In order to avoid prolonging the debate, he was prepared to consider, with the secretariat, any editorial amendment Mr. Barsegov might wish to make to paragraph 28 in order to clarify his point of view.

70. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 28, as amended by the Special Rapporteur and Mr. Al-Baharna (paras. 63 and 66 above), on that understanding.

It was so agreed.

Paragraph 28, as amended, was adopted.

Paragraphs 29 to 33

Paragraphs 29 to 33 were adopted.

Paragraph 34

71. Mr. SHI said that the words "post-Second World War", which more accurately reflected what he had said and were important, should be inserted between the words "since" and "State practice", in the third sentence.

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraph 35

Paragraph 35 was adopted.

Paragraph 36

72. Mr. McCAFFREY said that paragraph 36 was largely about the views of members who had opposed the Special

Rapporteur's proposal, while only a few lines were given to the views of those who had stressed the primacy of the nature of a contract as a criterion for determining its commercial character. The paragraph should therefore be divided into two. The second paragraph would begin after the phrase "Some other members felt that both the nature and purpose tests could be given equal importance", and would read:

> "Other members insisted on the primacy of the 'nature' test (or criterion), which was an objective one. In the opinion of some of those members, the 'purpose' test could only have a subsidiary character, coming into play only if the application of the 'nature' test did not lead to a clear interpretation of the contract. In the view of other members, the 'purpose' test was unworkable and had no place in the draft articles."

He wished to stress that the purpose of that amendment was to set out clearly, in two separate paragraphs, the various points of view expressed.

73. Mr. BARSEGOV said that he could agree to the paragraph reflecting the point of view of members who had opposed the "purpose" criterion, as long as the opposing view, namely that of members who thought that the "purpose" criterion should be applied in the first instance, was also reflected. His own opinion was that both criteria should be given equal importance.

74. Mr. OGISO (Special Rapporteur) said that, if his memory served him, most members of the Commission had accepted his proposal, with a few amendments or improvements. If any members had stated that they opposed the use of any criterion other than the purpose of a contract, he would be grateful to be so informed.

75. Mr. BENNOUNA (Rapporteur) said he thought that no one had proposed that the "purpose" criterion alone should be taken into account.

76. Mr. MAHIOU said the summary records showed that Mr. Al-Khasawneh had proposed using purpose as the sole criterion.

77. Mr. BARSEGOV said that, although Soviet doctrine attached great importance to the "purpose" criterion, he himself had declared that he would favour both criteria being given the same treatment. Several members of the Commission had also been of that view.

78. The CHAIRMAN said that that was precisely the interpretation to be given to the first sentence of paragraph 36, where it was stated that paragraph 3 of the new draft article 2, which contained the proposal of the Special Rapporteur, had been supported by several members.

79. Mr. McCAFFREY proposed that the word "could", in the fifth sentence, be replaced by "should".

It was so agreed.

80. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 36 as amended by Mr. McCaffrey (para. 72. above).

It was so agreed.

Paragraph 36, as amended, was adopted.

Paragraphs 37 and 38

Paragraphs 37 and 38 were adopted.

Paragraph 39

81. Mr. OGISO (Special Rapporteur) said that "(ii) and" should be inserted between "subparagraph (*b*)" and "(iii)", at the end of the first sentence.

Paragraph 39, as amended, was adopted.

Paragraphs 40 and 41

Paragraphs 40 and 41 were adopted.

Paragraph 42

82. Mr. McCAFFREY said that, since paragraph 42 covered two separate matters, it would be better to divide it into two. The second paragraph would begin after the sentence reading: "He suggested that the question should be referred to the Drafting Committee".

It was so agreed.

Paragraph 42, as amended, was adopted.

Paragraphs 43 to 51

Paragraphs 43 to 51 were adopted.

Paragraphs 52 and 53

83. Mr. BENNOUNA (Rapporteur) said that, since the headings had been deleted, paragraph 53 was no longer necessary and its content could be incorporated in paragraph 52.

84. Mr. KOROMA endorsed that suggestion and asked whether it was not contrary to the Commission's usual practice to specify the number of members who had supported the views of Governments referred to.

85. The CHAIRMAN said that it would indeed be preferable to say "Some members". He suggested that the sentence in question be inserted at the end of paragraph 52 and that it end with the words "referred to above".

It was so agreed.

Paragraphs 52 and 53, as amended, were adopted.

Paragraph 54

Paragraph 54 was adopted.

Paragraph 55

86. Mr. McCAFFREY suggested that the words "future convention", in the first sentence, should be replaced by "draft articles" or "draft", in accordance with the Commission's usual practice.

It was so agreed.

Paragraph 55, as amended, was adopted.

Paragraphs 56 and 57

Paragraphs 56 and 57 were adopted.

Paragraph 58

87. Mr. McCAFFREY proposed that, in the first sentence, the words "draft convention" should again be replaced by "draft articles" or "draft".

It was so agreed.

Paragraph 58, as amended, was adopted.

Paragraph 59

Paragraph 59 was adopted.

Paragraph 60

88. Mr. MAHIOU proposed that the last sentence should be replaced by the following text:

"One member also pointed out that it would be questionable to interpret the phrase as referring only to the restrictive doctrine, inasmuch as the rules of general international law still prevailed in the majority of States and they rather reflected the absolute doctrine of State immunity."

It was so agreed.

Paragraph 60, as amended, was adopted.

Paragraph 61

Paragraph 61 was adopted.

Paragraph 62

89. Mr. TOMUSCHAT proposed that the first part of the second sentence should be amended to read: "One member pointed out that the legal effect of a reservation was to restrict the obligations a State would otherwise undertake under a treaty . . .".

It was so agreed.

Paragraph 62, as amended, was adopted.

Paragraphs 63 to 68

Paragraphs 63 to 68 were adopted.

Paragraph 69

90. Mr. McCAFFREY proposed that the word "requirement" should be replaced by "effect".

It was so agreed.

Paragraph 69, as amended, was adopted.

Paragraphs 70 to 73

Paragraphs 70 to 73 were adopted.

Paragraph 74

91. Mr. McCAFFREY proposed that the words "*force majeure*", in the first sentence, should be replaced by "*rebus sic stantibus*".

It was so agreed.

Paragraph 74, as amended, was adopted.

Paragraphs 75 to 79

Paragraphs 75 to 79 were adopted.

Paragraph 80

92. Mr. BARSEGOV said that he thought he recalled hearing the idea put forward that the representative of a State could appear before a court of another State not only as a witness, as indicated in article 9, paragraph 3, but also in carrying out his consular obligations. He would like to hear the Special Rapporteur's opinion on that matter.

93. The CHAIRMAN said it was true that that question had been the subject of a discussion that could be summarized in paragraph 81. He would suggest that Mr. Barsegov give him a written proposal to that effect.

Paragraph 80 was adopted.

The meeting rose at 1 p.m.

2138th MEETING

Friday, 14 July 1989, at 3 p.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-first session (*continued*)

CHAPTER VI. ***Jurisdictional immunities of States and their property*** (continued) (A/CN.4/L.439 and Add.1 and 2)

B. Consideration of the topic at the present session (*continued*) (A/CN.4/L.439 and Add.1 and 2)

Paragraphs 81 to 87 (A/CN.4/L.439)

Paragraph 81

1. Mr. BARSEGOV proposed the addition of the following sentence at the end of paragraph 81: "The opinion was furthermore expressed that the new paragraph 3 should also cover the case of fulfilment of consular relations." The new paragraph 3 contemplated only the case in which a consul had to appear before a court of another State as a witness. Actually, a consul was often called upon to take part in legal proceedings other than as a witness, in order to perform the obligations of his office.

Mr. Barsegov's amendment was adopted.

Paragraph 81, as amended, was adopted.

Paragraphs 82 to 87

Paragraphs 82 to 87 were adopted.

Paragraphs 88 to 167 (A/CN.4/L.439/Add.1)

Paragraphs 88 to 92

Paragraphs 88 to 92 were adopted.

Paragraph 93

2. Mr. BENNOUNA (Rapporteur) proposed that, with suitable drafting adjustments, paragraph 93 should be transferred to its proper place immediately before paragraph 100, for it concerned draft article 11 *bis*.

It was so agreed.

Paragraph 93, as amended, was adopted.

Paragraphs 94 to 99

Paragraphs 94 to 99 were adopted.

Paragraph 100

3. Mr. AL-BAHARNA proposed the addition of the following sentence at the end of paragraph 100: "One member suggested that State enterprises, not being subject to State immunity, should be dealt with under a separate heading."

It was so agreed.

Paragraph 100, as amended, was adopted.

Paragraph 101

4. Mr. BENNOUNA (Rapporteur) proposed the deletion of the word "sovereign", before "States", in the first sentence. The adjective was unnecessary, since all States were sovereign.

It was so agreed.

5. Mr. FRANCIS said that he wished to propose the reformulation of the second sentence in order to clarify what he had said about the developing countries. He would submit his proposal in writing.

6. The CHAIRMAN said that the Commission would revert to paragraph 101 at the next meeting.

Paragraph 102

Paragraph 102 was adopted.

Paragraph 103

7. Mr. BARSEGOV proposed that the first sentence of paragraph 103 should be amended so as to remove, in the Russian text, the word "new", which qualified the words "draft article 11 *bis*". In the English text, the change would consist of replacing the word "reformulation" by "formulation". The wording for article 11 *bis* which he had proposed and which appeared in paragraph 103 was not a reformulation of, or an amendment to, the proposal by another member set forth in paragraph 102. It was a separate proposal.

Mr. Barsegov's amendment was adopted.

Paragraph 103, as amended, was adopted.

Paragraphs 104 to 106

Paragraphs 104 to 106 were adopted.

8. Mr. Sreenivasa RAO said that he wished to make a procedural suggestion, namely to dispense with the remainder of chapter VI of the draft report contained in documents A/CN.4/L.439/Add.1 and 2, which consisted of 35 pages dealing with the discussion on articles 12 to 28. That discussion, however, had not been conclusive and it had been agreed that the Commission would revert to those articles at the next session. The Commission should confine chapter VI to an account of the debate on articles 1 to 11. A footnote could be added to explain that there had been an exchange of views on articles 12 to 28.

9. Mr. CALERO RODRIGUES said that he was strongly opposed to that suggestion. The Commission had discussed articles 12 to 28 at length and chapter VI should faithfully reflect the proceedings on the topic of jurisdictional immunities of States and their property. There was no valid reason for leaving out any part of the discussion.

10. The CHAIRMAN said that, in view of the objection which had been raised, the Commission would proceed with its consideration of chapter VI.

Paragraphs 107 to 109

Paragraphs 107 to 109 were adopted.

Paragraph 110

11. Mr. BENNOUNA (Rapporteur) pointed out that the second sentence of paragraph 110 dealt with two different questions. He therefore proposed that it should be divided into two sentences, the second one beginning with the words "The scarcity of judicial decisions or evidence".

It was so agreed.

Paragraph 110, as amended, was adopted.

Paragraph 111

Paragraph 111 was adopted.

Paragraph 112

12. Mr. McCAFFREY proposed, as a drafting improvement, that the penultimate word "it" should be replaced by the words "the condition".

It was so agreed.

Paragraph 112, as amended, was adopted.

Paragraph 113

13. Mr. McCAFFREY proposed that, in the last sentence, the somewhat ambiguous wording "concerned with the deletion" should be replaced by "concerned about the deletion".

It was so agreed.

14. Mr. BENNOUNA (Rapporteur) pointed out that the problem of harmonizing the various terms used in English arose largely from the difficulty of rendering the French expression *puissance publique*. He suggested a form of words for the French text of paragraph 113 which would make that point clear.

15. Mr. BARBOZA stressed that the Spanish text of paragraph 13 was perfectly clear. The problem was that of harmonizing the terminology used in English, and it did not affect any other language.

16. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to align the French text of paragraph 113 with the Spanish text, if necessary.

It was so agreed.

Paragraph 113, as amended, was adopted.

Paragraph 114

17. Mr. TOMUSCHAT, supported by Mr. OGISO (Special Rapporteur), proposed that, in the last sentence, the abbreviation "EC" should be replaced by "Commission of the European Communities". Moreover, the word "regulations" should be inserted between the words "labour" and "to protect", in the second sentence.

It was so agreed.

Paragraph 114, as amended, was adopted.

Paragraph 115

18. Mr. McCAFFREY proposed that the phrase "caused by an act or omission attributable to a foreign State, which occurred in the territory of a forum State" should be deleted.

It was so agreed.

Paragraph 115, as amended, was adopted.

Paragraph 116

Paragraph 116 was adopted.

Paragraphs 117 and 118

19. Mr. BENNOUNA (Rapporteur) pointed out that the third sentence of paragraph 116 spoke of "public

international law". The word "public" should therefore be inserted before the words "international law" in the last sentence of paragraph 117 and the first sentence of paragraph 118.

20. Mr. CALERO RODRIGUES said that the purpose of harmonizing the language of the three paragraphs might be achieved more simply by deleting the word "public" before the words "international law" in paragraph 116.

21. The CHAIRMAN suggested that the words "international law" in the last sentence of paragraph 117 should be replaced by "State responsibility" and that the remainder of the sentence should be deleted.

22. Following a discussion in which Mr. AL-QAYSI, Mr. EIRIKSSON, Mr. RAZAFINDRALAMBO, Mr. AL-BAHARNA and Mr. BENNOUNA (Rapporteur) took part, the CHAIRMAN suggested that paragraphs 117 and 118 should be adopted without change.

It was so agreed.

Paragraphs 117 and 118 were adopted.

Paragraph 119

Paragraph 119 was adopted.

Paragraph 120

23. Mr. McCAFFREY proposed the replacement of the word "solicit", at the end of the first sentence, by "command" and the insertion of the word "traffic" before "accidents" in the second sentence.

It was so agreed.

Paragraph 120, as amended, was adopted.

Paragraph 121

24. Mr. RAZAFINDRALAMBO proposed that the words *les actes souverains*, at the end of the last sentence of the French text, should be replaced by *les actes de la puissance publique*.

It was so agreed.

Paragraph 121, as amended in the French text, was adopted.

Paragraph 122

Paragraph 122 was adopted.

Paragraph 123

25. Mr. McCAFFREY proposed that the paragraph should be devoted in its entirety to reflecting the views of members who had supported the retention of article 13. The wording of the first sentence should be slightly amended and a new sentence should be inserted. The paragraph would then read:

> "Other members supported the retention of article 13. They pointed out that disputes of this nature were not uncommon and considered that the provision was a necessary safeguard for the protection of individual victims. In their view, diplomatic protection was not a viable alternative as a practical matter."

The remaining sentence of paragraph 123, beginning with the words "Some other members", should be set apart in a separate paragraph.

It was so agreed.

Paragraph 123, as amended, was adopted.

Paragraph 124

Paragraph 124 was adopted.

Paragraph 125

26. Mr. BENNOUNA (Rapporteur) said that the second sentence of the French text should be aligned with the English by replacing the words *en y renvoyant* by *en faisant référence*.

27. The CHAIRMAN, responding to a comment by Mr. MAHIOU, suggested that the words "a large body of treaty law", in the second sentence, should be replaced by "provisions of treaty law".

It was so agreed.

Paragraph 125, as amended, was adopted.

Paragraph 126

28. Mr. TOMUSCHAT proposed that the paragraph should be divided into two sentences after the word "criterion", the second sentence beginning with the words "At any rate".

It was so agreed.

Paragraph 126, as amended, was adopted.

Paragraphs 127 to 129

Paragraphs 127 to 129 were adopted.

Paragraph 130

29. Mr. EIRIKSSON said that the word "three", in the last sentence, should be replaced by "four".

It was so agreed.

Paragraph 130, as amended, was adopted.

Paragraphs 131 to 138

Paragraphs 131 to 138 were adopted.

Paragraph 138 *bis*

30. Mr. McCAFFREY said that the word "is" should be replaced in the third sentence by "was", and in the fourth sentence by "were".

It was so agreed.

31. Mr. CALERO RODRIGUES suggested that the word "however", in the first sentence, should be deleted.

It was so agreed.

Paragraph 138 bis, *as amended, was adopted.*

Paragraph 139

32. Mr. SHI said that paragraph 139 did not fully reflect all the views expressed during the Commission's discussion. He would therefore propose that a new sentence be added at the end of the paragraph, reading: "In the opinion of one member, the article should be deleted altogether as it was derogatory to sovereignty and the sovereign equality of States."

33. Mr. AL-BAHARNA said that, if Mr. Shi's amendment were adopted, the phrase "though some other members doubted its necessity" would be redundant and could be deleted.

34. Mr. McCAFFREY said that the latter phrase should be retained because it drew a distinction between the position of some members who did not think that article 16 was particularly necessary, and the position of Mr. Shi, who was strongly opposed to the article. If the phrase was

to be retained, Mr. Shi's amendment might begin with the words "In the opinion of one member in particular".

Mr. Shi's amendment, as modified by Mr. McCaffrey, was adopted.

Paragraph 139, as amended, was adopted.

Paragraphs 140 to 142

Paragraphs 140 to 142 were adopted.

Paragraph 143

35. Mr. OGISO (Special Rapporteur) said that the last phrase of the paragraph, "in a more general language", should be replaced by "in more general terms".

Paragraph 143, as amended, was adopted.

Paragraph 144

Paragraph 144 was adopted.

Paragraph 145

36. Mr. AL-BAHARNA proposed that the words "for commercial but also governmental", in the second sentence, should be replaced by "not only for commercial, but also for governmental". His concern was to improve the drafting, not alter the intent, of the paragraph.

37. Mr. MAHIOU said that the sentence in question reflected the position of one particular Government, as set forth in the Special Rapporteur's preliminary report, and should therefore remain as drafted.

38. Following a brief discussion in which Mr. BENNOUNA (Rapporteur), Mr. AL-QAYSI, Mr. BARSEGOV, Mr. EIRIKSSON, Mr. KOTLIAR (Secretary to the Commission), Mr. McCAFFREY, Mr. OGISO (Special Rapporteur) and Mr. TOMUSCHAT took part, the CHAIRMAN suggested that paragraph 145 should remain as drafted.

It was so agreed.

Paragraph 145 was adopted.

Paragraph 146

39. Mr. BENNOUNA (Rapporteur) said that the phrase "discouraging private parties in the developed as well as other developing countries from engaging in commercial service with such ships", in the last sentence, was not very clear. It would be better to say ". . . from using the commercial services of such ships" or ". . . from engaging in commercial relations with such ships".

40. Mr. OGISO (Special Rapporteur) said that the idea which needed to be expressed was that private parties in the developing as well as developed countries might be discouraged from using such ships for commercial services. If the French text was not clear, it should by all means be brought into line with the English.

41. The CHAIRMAN suggested that the word "other", which appeared to be redundant, should be deleted from the phrase under discussion.

42. Mr. BENNOUNA (Rapporteur) said that the entire phrase "in the developed as well as other developing countries" was redundant and should be deleted.

43. Mr. MAHIOU said that he endorsed the Rapporteur's proposal that the words "engaging in commercial service with" should be replaced by "using the commercial services of".

44. Mr. Sreenivasa RAO said the idea was that, even in developing countries, there were private parties who might be engaged in a certain type of commercial relations, and it might be in their own interests not to press for immunity.

45. Mr. OGISO (Special Rapporteur) said that the point he wished to make in paragraph 146 was straightforward. The view had been expressed that the operation by States of ships in commercial service would contribute to the development of the developing countries. His own opinion, however, was that private parties in the developing countries might not welcome that kind of activity: such operation would not necessarily contribute, therefore, to the development of the developing countries. He would prefer the text of the paragraph to remain unchanged.

46. Mr. AL-QAYSI said that the Special Rapporteur was absolutely right. Those who had defended the addition of the term "non-governmental" to the text of article 18 had been motivated by a concern to protect the interests of the developing countries. The Special Rapporteur had been of the view that the term "non-governmental" should be deleted, otherwise the interests of the developing countries would not necessarily be protected. Private parties, when they saw that State-owned vessels used for public non-governmental service were claiming immunity, might decline to engage the services of such vessels. He agreed that the text of paragraph 146 should be left intact, although he thought, like the Rapporteur, that the words "engaging in commercial service" were awkward: the word "service" should perhaps be replaced by "transactions".

47. Mr. CALERO RODRIGUES said he agreed that the words "engaging in commercial service with such ships" were not very clear. They should perhaps be replaced by "utilizing the services of such ships".

48. Mr. OGISO (Special Rapporteur) pointed out that the same formula was used in the title and paragraphs 1 and 4 of article 18. Presumably, therefore, it was readily understandable.

49. Mr. AL-QAYSI said that there was nevertheless a difference between a ship engaged in commercial service and a private party engaging the commercial services of a ship. It might be appropriate to replace the words in question by "using the services of such ships".

50. Mr. McCAFFREY said that he endorsed the proposals by Mr. Calero Rodrigues and Mr. Al-Qaysi.

51. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to replace the phrase "from engaging in commercial service with such ships", at the end of paragraph 146, by "from using the services of such ships".

It was so agreed.

52. Mr. EIRIKSSON said that, for additional clarity, paragraph 146 should incorporate wording used in the Special Rapporteur's second report on the topic (A/CN.4/422 and Add.1, para. 25). The last sentence of the paragraph would end after the words "interests of developing countries", and the remaining part of that sentence would be replaced by a new sentence, incorporating the amendment already made and the additional language he was proposing, reading: "In his view, if States were not answerable for claims in respect of the operation of ships and cargoes on board those ships, private parties in the developed as

well as developing countries would hesitate to use the services of such ships."

53. Mr. OGISO (Special Rapporteur) said that, in order not to prolong the debate, he would agree to that amendment.

Mr. Eiriksson's amendment was adopted.

Paragraph 146, as amended, was adopted.

Paragraphs 147 to 149

Paragraphs 147 to 149 were adopted.

Paragraph 150

54. Mr. MAHIOU proposed that the first sentence should be amended to read: "During the Commission's discussion of the topic, many members supported the Special Rapporteur's proposal to delete the term 'non-governmental' in paragraphs 1 and 4, but some others held a contrary view."

55. Mr. BARSEGOV said that it was hardly possible to speak, as did the first sentence, of "all" members: he, for one, had not spoken at all in the discussion on the subject.

56. Mr. McCAFFREY proposed that, to meet Mr. Barsegov's point, the first part of the sentence should read: "During the Commission's discussion of the topic, many of the members who addressed the issue supported . . .".

Mr. Mahiou's amendment, as modified by Mr. McCaffrey, was adopted.

57. The CHAIRMAN, speaking as a member of the Commission, proposed that the following text should be added at the end of paragraph 150:

"Another member stressed that article 18 raised questions similar to those addressed in connection with the definition of the term 'State' in the new draft article 2 and of 'segregated State property' in draft article 11 *bis*. The question was not to ensure an advantage for States which had a large sector of State property, but to protect them against discrimination."

It was so agreed.

Paragraph 150, as amended, was adopted.

Paragraph 151

58. Mr. CALERO RODRIGUES proposed, in line with Mr. McCaffrey's proposal for paragraph 150, that the words "who spoke on the issue" should be added after the words "Members of the Commission", at the beginning of the paragraph.

59. Mr. BENNOUNA (Rapporteur) said that he saw no need for those words, which, if constantly repeated, would make the text cumbersome. In any event, chapter VI of the draft report stated at the outset that not all the members of the Commission had had an opportunity to speak on the topic, and it was implicit in that statement that only the views of those members who had spoken were reflected.

60. The CHAIRMAN said that, in such a long report, the reader might have difficulty in recalling exactly what had been stated at the outset. Moreover, where there had been agreement on particular points, it was advisable to make it clear that such agreement had been reached only among those members who had actually taken part in the debate. To avoid any misunderstanding, therefore, he would suggest that Mr. Calero Rodrigues's proposal be adopted.

It was so agreed.

Paragraph 151, as amended, was adopted.

Paragraphs 152 to 156

Paragraphs 152 to 156 were adopted.

Paragraphs 157 and 158

61. Mr. McCAFFREY pointed out that the word "arbitrary", in the second sentence of paragraph 157 and in the first and second sentences of paragraph 158, should read "arbitral".

It was so agreed.

Paragraphs 157 and 158, as amended, were adopted.

Paragraphs 159 to 167

Paragraphs 159 to 167 were adopted.

Paragraphs 168 to 178 (A/CN.4/L.439/Add.2)

Paragraph 168

Paragraph 168 was adopted.

Paragraph 169

62. Mr. OGISO (Special Rapporteur) said that the words "intended use", in the third sentence, should read "intended for use".

63. Mr. EIRIKSSON proposed that the word "only", in the second sentence, should be deleted.

It was so agreed.

Paragraph 169, as amended, was adopted.

Paragraphs 170 to 170 *ter*

Paragraphs 170 to 170 ter *were adopted.*

Paragraph 171

Paragraph 171 was adopted.

Paragraph 172

64. Mr. BENNOUNA (Rapporteur) proposed that, in order to convey the discussion on the subject more accurately, the last sentence should be replaced by the following text: "Some members proposed replacing the notion of a 'legally protected interest' by that of a 'real right', which was equivalent, thereby following the judgment in the *Barcelona Traction* case."

It was so agreed.

Paragraph 172, as amended, was adopted.

Paragraphs 173 and 174

Paragraphs 173 and 174 were adopted.

Paragraph 175

65. Mr. OGISO (Special Rapporteur) said that the words "article 21, in particular subparagraph (*a*), put a significant limitation on", in the first sentence, should be replaced by "article 21 should spell out".

Paragraph 175, as amended, was adopted.

Paragraph 176

Paragraph 176 was adopted.

Paragraph 177

66. The CHAIRMAN proposed that paragraph 177 should be deleted.

It was so agreed.

Paragraph 178

Paragraph 178 was adopted.

The meeting rose at 6 p.m.

2139th MEETING

Monday, 17 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-first session (*continued*)

CHAPTER VI. ***Jurisdictional immunities of States and their property*** (concluded) (A/CN.4/L.439 and Add.1 and 2)

B. Consideration of the topic at the present session (*concluded*) (A/CN.4/L.439 and Add.1 and 2)

Paragraph 101 (*concluded*) (A/CN.4/L.439/Add.1)

1. Mr. FRANCIS said that the second sentence of paragraph 101 was meant to record the opinion expressed by himself and Mr. Njenga. He proposed, with the agreement of the latter, that it be replaced by the following text:

> "Some other members felt that such an exemption was also important to developing countries. In that connection, it was said that there had been many instances in which judicial process had been instituted against a State with respect to commercial contracts of a State enterprise having separate and distinct juridical status under national law for the execution of its functions. Such proceedings should, in the view of those members, be confined to such enterprises not only on the basis of legal principles, but also taking into account the limited economic resources of developing countries and the very high cost of litigation in certain other countries."

It was so agreed.

Paragraph 101, as amended, was adopted.

Paragraph 175 (*concluded*) (A/CN.4/L.439/Add.2)

2. Mr. SHI, reverting to paragraph 175, which had been amended by the Special Rapporteur at the previous meeting (para. 65), proposed that, in order to render more faithfully his own remarks concerning article 21, the first sentence should be further amended to read:

> "One member was of the view that article 21 should explicitly spell out the principle of State immunity in respect of property from measures of constraint, along the lines of article 23 of the 1972 European Convention on State Immunity, incorporating some of the elements of article 22 of the present draft."

It was so agreed.

Paragraphs 179 to 211 (A/CN.4/L.439/Add.2)

Paragraph 179

Paragraph 179 was adopted subject to a correction.

Paragraphs 180 to 186

Paragraphs 180 to 186 were adopted.

Paragraph 187

3. Mr. SHI proposed that, in order to reflect the discussion more accurately, the following sentence should be added at the end of the paragraph: "A few members favoured its deletion."

It was so agreed.

Paragraph 187, as amended, was adopted.

Paragraphs 188 and 189

Paragraphs 188 and 189 were adopted.

Paragraph 190

4. Mr. OGISO (Special Rapporteur) said that, in the second sentence, the words "he said" should be deleted.

Paragraph 190, as amended, was adopted.

Paragraph 191

Paragraph 191 was adopted.

Paragraph 192

5. Mr. McCAFFREY proposed that, in the first sentence, the words "his proposal" should be replaced by "that proposal". In the second sentence, the word "as", before the words "in paragraph 3", should be deleted.

It was so agreed.

Paragraph 192, as amended, was adopted.

Paragraph 193

Paragraph 193 was adopted.

Paragraph 194

6. Mr. CALERO RODRIGUES suggested that the words "due process", in the first sentence, should be replaced by "due service of process".

It was so agreed.

Paragraph 194, as amended, was adopted.

Paragraph 195

Paragraph 195 was adopted.

Paragraph 196

7. Mr. McCAFFREY, observing that normally the receipt of documents instituting a proceeding was presumed when they had been served in due form, proposed that the word "due", before the words "service of process" in the second sentence, should be deleted.

It was so agreed.

Paragraph 196, as amended, was adopted.

Paragraph 197

8. After an exchange of views in which Mr. McCAFFREY and Mr. AL-QAYSI took part, the CHAIRMAN suggested that the words "as they did" should be replaced by "a change which they had also proposed".

It was so agreed.

Paragraph 197, as amended, was adopted.

Paragraphs 198 to 203

Paragraphs 198 to 203 were adopted.

Paragraph 204

9. Mr. McCAFFREY asked what was the purpose of the second sentence: did it reflect a comment made by members

other than those who had "expressed doubts about the proposed reformulation" of paragraph 2 of article 27?

10. Mr. OGISO (Special Rapporteur) said that the sentence was intended to give the reasons for the doubts expressed. To make it clearer, he proposed that the word "indiscriminately" be deleted.

It was so agreed.

Paragraph 204, as amended, was adopted.

Paragraphs 205 and 206

Paragraphs 205 and 206 were adopted.

Paragraph 207

11. Mr. BENNOUNA, noting that the third sentence summarized his comments, proposed that the last part of it should be amended to read: ". . . require national courts to defer to the injunctions of the executive in order to abide by the principle of reciprocity".

It was so agreed.

Paragraph 207, as amended, was adopted.

Paragraph 208

Paragraph 208 was adopted.

Heading preceding paragraph 209

The heading preceding paragraph 209 was adopted.

Paragraph 209

12. The CHAIRMAN proposed that the words "and adopted" be deleted: if the draft articles and annex in question had not been discussed, it was obvious they could not have been adopted.

It was so agreed.

Paragraph 209, as amended, was adopted.

13. The CHAIRMAN said that the secretariat would ensure that the texts of Part VI of the draft articles and the annex, on the settlement of disputes, reproduced in the report were the correct ones.

Paragraph 210

14. The CHAIRMAN, noting that two members of the Commission had spoken on the proposals in question, suggested that the words "in detail", in the first sentence, should be deleted.

It was so agreed.

Paragraph 210, as amended, was adopted.

Paragraph 211

15. Mr. BENNOUNA (Rapporteur) said that it would be advisable to consult the General Assembly on the question whether the provisions relating to the settlement of disputes should form part of the draft articles or be a separate optional protocol, or whether the matter should be left to a diplomatic conference.

16. After an exchange of views in which Mr. NJENGA, Mr. CALERO RODRIGUES, Mr. BARBOZA, Mr. FRANCIS, Mr. BARSEGOV, Mr. McCAFFREY, Mr. JACOVIDES and Mr. OGISO (Special Rapporteur) took part, the CHAIRMAN proposed that the following sentence be added at the end of paragraph 211: "Before the matter is considered further, an indication of the preference of the General Assembly would be useful to the Commission."

It was so agreed.

Paragraph 211, as amended, was adopted.

Section B, as amended, was adopted.

Chapter VI of the draft report, as amended, was adopted.

CHAPTER V. ***International liability for injurious consequences arising out of acts not prohibited by international law*** (A/CN.4/L.438)

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 5 to 7

Paragraphs 5 to 7 were adopted.

Paragraph 8

17. Mr. McCAFFREY questioned whether the word "areas", used twice in the penultimate sentence, was really appropriate, and whether the word "issues", which appeared in the next sentence, would not be preferable.

18. Mr. BARBOZA (Special Rapporteur) said that, in the first case, the word "issues" was indeed preferable. In the second case, however, the word "areas" should be retained, since it designated zones beyond national jurisdiction.

19. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to replace the word "areas", at the beginning of the penultimate sentence of paragraph 8, by "issues".

It was so agreed.

Paragraph 8, as amended, was adopted.

Paragraph 9

20. Mr. BARSEGOV said that the words "strongly supported", in the second sentence, did not reflect the discussions in the Commission or in the Sixth Committee of the General Assembly, where many States—including the USSR, which he had represented—had taken the opposite view. He would revert to the matter later in the consideration of chapter V of the draft report.

Paragraph 9 was adopted.

Paragraphs 10 to 12

Paragraphs 10 to 12 were adopted.

Paragraph 13

21. Mr. BARBOZA (Special Rapporteur) said that, to be more precise, the words "such as those" should be added after the word "activities", in the second sentence.

Paragraph 13, as amended, was adopted.

Paragraph 14

Paragraph 14 was adopted.

Paragraph 15

22. Mr. MAHIOU and Mr. BENNOUNA said that they were not satisfied with the French translation of the concepts of "liability" and "responsibility".

23. Mr. McCAFFREY said that the expression "causal liability", in the second sentence, was obscure.

24. Mr. BARSEGOV said that the Russian text was equally vague.

25. The CHAIRMAN proposed that the Commission should revert to those linguistic problems after taking time for reflection and consultation.

It was so agreed.

Paragraphs 16 and 17

Paragraphs 16 and 17 were adopted.

Paragraph 18

26. Mr. McCAFFREY proposed that the word "matter", in the fourth sentence, should be replaced by "subject-matter". The next two sentences should also be amended to refer to "balance of interests", since the plural was more correct than the singular.

It was so agreed.

27. Lastly, the concluding sentence of the paragraph was not clear: one could not tell whether the expression "affected by harm" referred to the "parties" or the "balance of interests".

28. Mr. BEESLEY proposed that the words "which was affected by harm", in the last sentence, should be deleted so as to remove the ambiguity.

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

Paragraph 19 was adopted.

Paragraph 20

29. Mr. BARBOZA (Special Rapporteur) said that the beginning of the first sentence should be amended so as to state that the principle of co-operation was "one of the bases" for the procedural obligations of States.

Paragraph 20, as amended, was adopted.

Paragraphs 21 to 26

Paragraphs 21 to 26 were adopted.

Paragraph 27

30. Mr. BARBOZA (Special Rapporteur) said that, in order to make the penultimate sentence more precise, the words "in the absence of such a régime" should be inserted before the words "to negotiate reparation for the harm".

Paragraph 27, as amended, was adopted.

Paragraphs 28 to 31

Paragraphs 28 to 31 were adopted.

Paragraph 32

31. Mr. BARSEGOV, noting that the section beginning with paragraph 32 was placed under the heading "Comments on . . . articles 1 to 9", said that the word "comments" was not appropriate, since the Commission had had a real exchange of views on those articles.

32. Mr. BENNOUNA (Rapporteur) said that he had already had occasion to deplore the fact that special rapporteurs and the Rapporteur of the Commission did not decide on a uniform structure for the different chapters of the report. As to the headings and subheadings, it was true that the Commission had decided to delete them from section B of chapter VI of its report, but in the present instance they seemed indispensable for an understanding of the text.

33. After a discussion in which Mr. EIRIKSSON, Mr. McCAFFREY and Mr. BARBOZA (Special Rapporteur) took part, the CHAIRMAN suggested that the structure of chapter V of the draft report be amended as follows: paragraph 7 would be replaced by the heading "1. Introduction of the fifth report by the Special Rapporteur"; and paragraph 32 would be preceded by the heading "2. Consideration of draft articles 1 to 9 by the Commission".

It was so agreed.

34. Mr. BARBOZA (Special Rapporteur) said that the words "or creating a risk of causing harm" should be inserted after the words "activities causing harm", in the second sentence of paragraph 32.

Paragraph 32, as amended, was adopted.

Paragraph 33

35. Mr. BARSEGOV observed that, in the fourth sentence, it was stated that the title of the topic "did not refer to 'licit' or 'illicit' acts but to acts 'not prohibited by international law'". The Special Rapporteur appeared to be answering a question which had not been asked or to be upholding a certain point of view without recording the opinion of members of the Commission who were not in agreement with it. He himself had always maintained that what was not prohibited was permitted, and that the distinction between "licit" and "illicit" was irrelevant in the present context. He therefore proposed that the considerations expressed in the sentence in question be deleted or that the view supported by other members of the Commission be presented.

36. Mr. BARBOZA (Special Rapporteur) pointed out that paragraph 33 did not reflect the opinion of the Special Rapporteur, but that of some members of the Commission. The contrary view had been presented at the previous session and it seemed difficult to record it in the Commission's report on its forty-first session.

37. Mr. BEESLEY noted that the sentence quoted by Mr. Barsegov summarized what he himself had said during the discussion. He was willing to reconsider that sentence or even to delete it if, at the end of the Commission's consideration of chapter V of its report, Mr. Barsegov thought that the summary of its work was not balanced.

38. Mr. BARSEGOV said that he was satisfied with the explanations given and would not press for the amendment of paragraph 33 in that respect.

39. He was doubtful, however, about the adjective "eclectic" in the seventh sentence. It seemed inappropriate to say that the Commission "must also be eclectic in seeking precedents for its work", since that would not be in conformity with its usual methods of work.

40. Mr. BEESLEY proposed that the word "eclectic" be replaced by "flexible".

It was so agreed.

41. Mr. McCAFFREY noted that the sequence of tenses was rather erratic in paragraphs 33 *et seq.*

42. The CHAIRMAN said that the secretariat would revise the text in that respect.

Paragraph 33, as amended, was adopted.

Paragraph 34

Paragraph 34 was adopted.

Paragraph 35

43. Mr. BARSEGOV proposed that the second sentence be replaced by the following text:

"In the view of one member, invocation of analogous principles selectively taken from individual decisions of domestic courts was not always justified, since the decisions of domestic courts and domestic law were not sources of international law."

44. Mr. ARANGIO-RUIZ said he doubted whether that text adequately reflected Mr. Barsegov's opinion, since he had denied the possibility of deriving principles of international law by proceeding by analogy with internal law.

45. Mr. BARSEGOV said that the word "analogous" in his amendment could be deleted.

Mr. Barsegov's amendment was adopted.

Paragraph 35, as amended, was adopted.

Paragraph 36

46. Mr. BARSEGOV said he doubted whether the phrase "the articles may be drafted in a way that was appropriate for a residual convention", in the fifth sentence, accurately reflected the discussion, since the preference of several members of the Commission was for a list enumerating the activities to which the articles applied. He therefore proposed the addition of the following sentence to summarize what he had said about the list of activities:

"Another member remarked that no member of the Commission had been able to indicate which types of activity entailing no risk could be the cause of transboundary harm considered as the sole source of liability."

47. Mr. EIRIKSSON said he was not sure how the words "considered as the sole source of liability" in that amendment should be understood.

48. Mr. BARSEGOV said that, according to the dualist approach, liability could be considered to derive either from activities involving risk or from activities involving no obvious risk; but could anyone give an example of an activity which, although it involved no intrinsic risk, could nevertheless cause harm?

49. Mr. BARBOZA (Special Rapporteur) said that Mr. Barsegov's view was reflected in paragraph 41.

50. Mr. EIRIKSSON said he thought that the amendment proposed by Mr. Barsegov should apply to paragraph 41.

51. Mr. CALERO RODRIGUES said that proposals made by a member of the Commission with a view to recording in the Commission's report an opinion he had expressed should not give rise to a discussion.

52. Mr. BARSEGOV said that he had no objection to the sentence he had proposed being added to paragraph 41 rather than to paragraph 36; he had raised the matter in connection with paragraph 36 only because the list of activities was mentioned there.

53. The CHAIRMAN said that the Commission would revert to Mr. Barsegov's proposal when it considered paragraph 41.

54. In the eighth sentence of paragraph 36, he suggested that the words "another member" be replaced by "some members".

It was so agreed.

Paragraph 36, as amended, was adopted.

Paragraph 37

55. Mr. BARSEGOV said that he had indeed expressed the opinion summarized in the first sentence, but from a different viewpoint. In his view, the different types of responsibility were not interchangeable: to confuse them introduced a dualist approach into the study of the topic.

56. Mr. BEESLEY said he recognized that it was difficult to record the opinions of members of the Commission in the report, but added that, at the present stage, concrete proposals would be preferable.

57. Mr. BARBOZA (Special Rapporteur) observed that the sentence called in question by Mr. Barsegov in fact reflected the opinion of Mr. Thiam. He suggested that the words "In the view of a member" should be replaced by "In the view of two members of the Commission".

58. After an exchange of views in which Mr. BENNOUNA (Rapporteur), Mr. BARSEGOV, Mr. McCAFFREY and Mr. BARBOZA (Special Rapporteur) took part, Mr. BARSEGOV proposed the addition of the following sentence: "According to one member of the Commission, the different types of responsibility could not be combined, and unfortunately the dualist approach would lead to that eventuality."

59. Mr. BEESLEY said he agreed with the Special Rapporteur that there could be two bases of no-fault liability, which could be reflected in one and the same text. If the draft report, which was balanced and fair, was to be called in question again by additions and amendments intended to record what he must regretfully qualify as a minority view, he would have to do what was required to restore the balance or even reopen the debate if necessary.

60. The CHAIRMAN said he understood that, according to Mr. Barsegov, the Commission's position could be a source of confusion. But did not the penultimate sentence of paragraph 37 reflect that concern? He invited the Commission to revert to paragraph 37 at the next meeting.

The meeting rose at 1.05 p.m.

2140th MEETING

Monday, 17 July 1989, at 3 p.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-first session (*continued*)

CHAPTER V. *International liability for injurious consequences arising out of acts not prohibited by international law* (continued) (A/CN.4/L.438)

B. Consideration of the topic at the present session (*concluded*)

Paragraph 15 (*concluded*)

1. Mr. BENNOUNA (Rapporteur) recalled that objections had been raised at the previous meeting to the use of the expressions *responsabilité indirecte* in French and "causal liability" in English. After consulting the Special Rapporteur, he would propose that, in conformity with general usage, the expressions to be used in paragraph 15 should be *responsabilité objective* and "strict liability", i.e. the expressions used elsewhere in the draft report. Accordingly, he proposed that the third sentence be amended to read: "The decision of the arbitral tribunal in the *Trail Smelter* case had provided for a twofold régime of responsibility for wrongfulness and strict liability."

It was so agreed.

Paragraph 15, as amended, was adopted.

Paragraph 37 (*concluded*)

2. The CHAIRMAN said that Mr. Thiam wished to propose that the first sentence of paragraph 37 be amended to read: "According to one member, the Special Rapporteur had not always drawn the line between the topic of State responsibility for wrongful acts and the present topic."

3. If there were no objections, he would take it that the Commission agreed to adopt that amendment.

It was so agreed.

Paragraph 37, as amended, was adopted.

Paragraph 38

4. Mr. McCAFFREY proposed that the fourth sentence, reading: "Otherwise, they feared that the matter would be taken up by other specialized bodies", should be deleted.

It was so agreed.

Paragraph 38, as amended, was adopted.

Paragraph 39

5. Mr. BARSEGOV asked why certain passages were underlined.

6. Mr. BARBOZA (Special Rapporteur) explained that the purpose was to draw the attention of the Sixth Committee of the General Assembly to certain points.

7. Mr. Sreenivasa RAO expressed doubts about the wisdom of underlining any passage.

8. Mr. CALERO RODRIGUES proposed that the underlining should be dispensed with, not only in paragraph 39 but also in the following paragraphs.

It was so agreed.

Paragraph 39, as amended, was adopted.

Paragraph 40

Paragraph 40 was adopted.

Paragraph 41

9. The CHAIRMAN drew attention to a proposal by Mr. Barsegov to reformulate the first two sentences of paragraph 41 as follows:

"Concern was expressed about the inclusion of appreciable harm within the scope of the articles as the basis of liability by itself. One member felt that that was tantamount to establishing absolute liability for any appreciable harm and that it would make the dividing line between the present topic and that of State responsibility less clear."

10. Mr. BARBOZA (Special Rapporteur) asked what was the effect of the words "by itself", at the end of the first sentence of that amendment.

11. Mr. BARSEGOV explained that appreciable harm was being treated as the only basis of liability or as the basis of liability *per se*. Hence his objection.

Mr. Barsegov's amendment was adopted.

Paragraph 41, as amended, was adopted.

Paragraphs 42 and 43

Paragraphs 42 and 43 were adopted.

Paragraph 44

12. Mr. BARSEGOV expressed doubts about the last part of the first sentence, which spoke of the "very strong views which were expressed in the Commission last year and in the Sixth Committee", in connection with the concepts of harm and risk. As he recalled, there had been a marked division of opinion on the subject both in the Commission and in the Sixth Committee of the General Assembly.

13. Mr. BARBOZA (Special Rapporteur) pointed out that paragraph 44 contained an expression of his own views as Special Rapporteur. He believed he was right in saying that "very strong views" had been expressed on the question, both in the Commission at its fortieth session and in the Sixth Committee. Moreover, he had not suggested that there had been a majority opinion in the matter.

Paragraph 44 was adopted.

Paragraph 45

14. Mr. BENNOUNA (Rapporteur) noted the reference in the first sentence to the "global commons". Some explanation should be given regarding the meaning of that somewhat unfamiliar expression.

15. The CHAIRMAN pointed out that the expression had first been used in paragraph 8, which would therefore seem a more appropriate place for an explanation.

16. Mr. MAHIOU proposed the insertion of the words "in particular those constituting the common heritage of mankind" at the end of the fifth sentence of paragraph 8, which referred to the "global commons" and to "areas beyond the national jurisdiction of any State". The expression "common heritage of mankind" was well established and was used in the 1982 United Nations Convention on the Law of the Sea.

17. Mr. BARBOZA (Special Rapporteur) said that the formula undoubtedly had intrinsic merits, but paragraph 8 gave an account of his own statement as Special Rapporteur and he had never referred to the common heritage of mankind.

18. Mr. BENNOUNA (Rapporteur) said that, in the course of the discussion, he had referred to the common heritage of mankind.

19. Mr. RAZAFINDRALAMBO said that he, too, had referred to that concept during the discussion. He supported the proposal by Mr. Mahiou.

20. Mr. AL-QAYSI said that the phrase proposed by Mr. Mahiou could not be inserted in paragraph 8, which contained the views of the Special Rapporteur. The only suitable place would be paragraph 39, which presented the views of members of the Commission.

21. Mr. MAHIOU said that he agreed with Mr. Al-Qaysi and suggested that the phrase be inserted at the end of the first sentence of paragraph 39.

It was so agreed.

22. Mr. BEESLEY said that it was necessary to correct a mistake in the fourth sentence of paragraph 39, which read ". . . it was difficult to see how such a view could be reconciled with the principle of sovereignty". The word "view" should be replaced by "concept". The passage in question purported to reflect views expressed by him.

It was so agreed.

23. Mr. McCAFFREY proposed that the words "eventual liability", in the first sentence of paragraph 45, should be replaced by "issue of liability".

It was so agreed.

Paragraph 45, as amended, was adopted.

Paragraph 46

Paragraph 46 was adopted.

Paragraph 47

24. Mr. McCAFFREY said that the second sentence implied that the trend of opinion in the Commission was that, where transboundary harm had occurred, there was no obligation other than to negotiate. The intended meaning, in his view, was that, in cases involving risk, there had, up to now, been no obligation other than to negotiate.

25. Mr. BEESLEY, endorsing Mr. McCaffrey's remarks, said that the sentence could be more felicitously worded.

26. Mr. BARBOZA (Special Rapporteur) proposed that the second sentence be amended to read:

> "There seemed to be a widely shared view in the Commission in favour of no liability before transboundary harm occurred; and even when such harm occurred, there had, up to now, been no obligation other than to negotiate the compensation due."

27. Mr. McCAFFREY said that, since the sentence was intended to reflect the view of the Special Rapporteur, he could not object to the proposed amendment. At the same time, he was bound to point out that, to his recollection, the view that there was no obligation other than to negotiate when transboundary harm occurred had not been expressed during the debate.

28. Mr. TOMUSCHAT pointed out that the whole sentence, both before and after the semicolon, reflected the opinion of the Special Rapporteur rather than a majority trend in the Commission.

29. After a discussion in which Mr. AL-QAYSI, Mr. McCAFFREY, Mr. BEESLEY and Mr. BARBOZA (Special Rapporteur) took part, the CHAIRMAN suggested that the Special Rapporteur's amendment should be adopted.

It was so agreed.

Paragraph 47, as amended, was adopted.

Subheading preceding paragraph 48

30. The CHAIRMAN suggested that the subheading preceding paragraph 48 should be amended to read "Comments on specific articles".

It was so agreed.

The subheading preceding paragraph 48, as amended, was adopted.

Paragraph 48

31. Mr. BARSEGOV proposed that the word "rightly", in the second sentence, should be deleted.

It was so agreed.

Paragraph 48, as amended, was adopted.

Paragraphs 49 to 53

Paragraphs 49 to 53 were adopted.

Paragraph 54

32. Mr. BARBOZA (Special Rapporteur) said that the sixth, seventh and eighth sentences, from "A doubt, however . . ." to ". . . the control of other States", should be replaced by the following text:

> "One member doubted, however, that that formula could effectively protect developing countries. Since the concepts of 'jurisdiction' and 'control' in the draft articles were now limited to 'places', they would no longer cover the jurisdiction and control exercised by the home State of a multinational corporation whose harmful activities took place in a foreign State."

Paragraph 54, as amended, was adopted.

Paragraphs 55 and 55 *bis*

Paragraphs 55 and 55 bis *were adopted.*

Paragraph 56

33. Mr. McCAFFREY, referring to the third sentence, said that the words "fell below the accepted . . . standard" usually meant a weaker standard, whereas a stricter one was in fact required. He would be inclined to say that the expression "appreciable risk" was "more demanding" than the accepted standard, or something along those lines.

34. The CHAIRMAN suggested that the word "standard" should be replaced by "threshold".

It was so agreed.

Paragraph 56, as amended, was adopted.

Paragraph 57

Paragraph 57 was adopted.

Paragraph 58

35. Mr. McCAFFREY proposed that the words "attribution" and "assignment" should be placed between quotation marks.

It was so agreed.

Paragraph 58, as amended, was adopted.

Paragraph 59

Paragraph 59 was adopted with minor drafting changes.

Paragraph 60

Paragraph 60 was adopted.

Paragraph 61

36. Mr. BEESLEY asked whether the references to strict liability in the first sentence and to absolute liability in the last sentence were deliberate. He had consistently made the point that the two expressions should not be used interchangeably.

37. Mr. BARBOZA (Special Rapporteur) suggested that the expression "absolute liability" should be used in both places.

It was so agreed.

Paragraph 61, as amended, was adopted.

Paragraph 62

Paragraph 62 was adopted.

Paragraph 63

38. Mr. EIRIKSSON proposed that the words "texts in square brackets", in the second sentence, should be replaced by "article" and the word "latter" by "matter".

It was so agreed.

Paragraph 63, as amended, was adopted.

Paragraph 64

39. Mr. BENNOUNA (Rapporteur), referring to the second sentence, said that he had heard of no such principle as "limited State sovereignty" and thought that the expression should be avoided. Indeed, the whole sentence was not clear.

40. Mr. BARBOZA (Special Rapporteur) suggested that, in order to reflect the concept more accurately, the words "the principle of limited State sovereignty to act freely" should be replaced by "the sovereign right of a State to act freely within its territory".

41. Mr. ARANGIO-RUIZ said that the expression "within its territory" was unnecessary and should not be included.

42. Mr. BARBOZA (Special Rapporteur) said he would prefer to retain that expression for the sake of clarity.

The Special Rapporteur's amendment was adopted.

43. Mr. CALERO RODRIGUES said that the words "that of inviolability", in the same sentence, should be replaced by "the inviolability".

It was so agreed.

Paragraph 64, as amended, was adopted.

Paragraphs 65 to 67

Paragraphs 65 to 67 were adopted.

Paragraph 68

44. Mr. McCAFFREY said that, in the interests of clarity, the phrase "than those available in the former", at the end of the third sentence, should be replaced by "than would be 'available' in the former sense".

45. Mr. AL-QAYSI said that the sentence could be made even clearer simply by deleting the phrase "than those available in the former".

It was so agreed.

Paragraph 68, as amended, was adopted.

Paragraph 69

46. Mr. BENNOUNA (Rapporteur) said that, in the first sentence of the French text, the words *l'absence de mesures de prévention de la part de l'Etat d'origine* should be replaced by *la non-adoption de mesures de prévention par l'Etat d'origine.*

Paragraph 69, as amended in the French text, was adopted.

Paragraph 70

Paragraph 70 was adopted.

Paragraph 71

47. Mr. BARSEGOV proposed that the penultimate sentence should be amended to read: "One member, however, found it counter-productive to set a régime of reparation in which the fact was totally ignored that the State of origin was also harmed while carrying on pioneering activities and suffered even more than the innocent victim." The last sentence should be deleted.

It was so agreed.

Paragraph 71, as amended, was adopted.

Paragraphs 72 and 73

Paragraphs 72 and 73 were adopted.

Paragraph 74

48. Mr. TOMUSCHAT suggested that the words "by some members" should be inserted between the words "found" and "not" in the first sentence.

It was so agreed.

49. Mr. BENNOUNA (Rapporteur) said that the views reflected in the third and fourth sentences were not related specifically to the "global commons" and should therefore be set out in a separate paragraph, the beginning of which would read: "Some members suggested providing, instead of negotiations, for a procedure for notification, or for the submission . . .".

It was so agreed.

50. Mr. McCAFFREY proposed the addition, after the second sentence, of the following sentence: "It was suggested that, in these cases, notification, consultation and other procedures could be effected through a clearing-house such as a competent international organization."

Paragraph 74, as amended, was adopted.

Paragraphs 75 and 76

Paragraphs 75 and 76 were adopted.

Paragraph 77

51. Mr. BENNOUNA (Rapporteur) suggested that, since paragraph 77 dealt with a point of detail, it might be deleted.

It was so agreed.

Paragraphs 78 to 91

Paragraphs 78 to 91 were adopted.

Paragraph 92

Paragraph 92 was adopted with a minor drafting change.

Paragraphs 93 and 94

Paragraphs 93 and 94 were adopted.

Section B, as amended, was adopted.

52. Mr. BENNOUNA (Rapporteur) remarked that, in view of the highly complex and delicate nature of the issue of procedures, the Special Rapporteur might wish to suggest

that a question on that point be addressed to the Sixth Committee of the General Assembly.

53. Mr. BARBOZA (Special Rapporteur) said that he had detected a clear trend in the Commission in favour of formulating procedural articles of a general rather than of a detailed nature. He therefore saw no point in addressing a question on that issue to the Sixth Committee.

54. Mr. CALERO RODRIGUES, recalling that the General Assembly, in paragraph 5 (*c*) of its resolution 43/169 of 9 December 1988, had requested the Commission to indicate in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work, remarked that in the absence of an indication of specific issues the debate in the Sixth Committee would risk being somewhat unstructured.

55. Mr. BARBOZA (Special Rapporteur) said that, if the Commission considered that some specific question should be formulated, he would not object to seeking the Sixth Committee's guidance on the question of procedures. However, as he had already stated, he saw no need for such action.

56. After a discussion in which Mr. CALERO RODRIGUES, Mr. OGISO and Mr. BEESLEY took part, the CHAIRMAN suggested that chapter V of the draft report be adopted without any further addition.

It was so agreed.

Chapter V of the draft report, as amended, was adopted.

The meeting rose at 6.05 p.m.

2141st MEETING

Tuesday, 18 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its forty-first session (*continued*)

CHAPTER V. ***International liability for injurious consequences arising out of acts not prohibited by international law*** (concluded) (A/CN.4/L.438)

1. Mr. BARBOZA (Special Rapporteur) said that, after considerable thought and in view of the arguments advanced at the previous meeting, he had decided not to ask the General Assembly any specific questions concerning the topic entrusted to him.

CHAPTER VII. ***The law of the non-navigational uses of international watercourses*** (A/CN.4/L.440 and Corr.1 and Add.1 and 2)

A. Introduction (A/CN.4/L.440 and Corr.1)

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraphs 5 and 6

2. Mr. McCAFFREY (Special Rapporteur) said that, when the draft report was being drawn up, he had been unaware that the draft articles already provisionally adopted by the Commission would be reproduced in a section of chapter VII. Accordingly, it would be better to reproduce the Commission's provisional working hypothesis in a footnote to article 1. The part of paragraph 6 beginning with the words "The hypothesis was contained ..." could therefore be deleted and the remaining first sentence could be placed at the end of paragraph 5. A footnote would be added to indicate that the provisional working hypothesis was reproduced in the later footnote.

3. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the Special Rapporteur's amendment.

It was so agreed.

Paragraphs 5 and 6, as amended, were adopted.

Paragraphs 7 to 11

Paragraphs 7 to 11 were adopted.

Paragraph 12

4. Mr. McCAFFREY (Special Rapporteur) said that "(arts. 10-15)" should be inserted after the words "six draft articles".

Paragraph 12, as amended, was adopted.

Paragraph 13

5. Mr. McCAFFREY (Special Rapporteur) said that paragraph 13 was too long and should be replaced by the following text: "After discussion in the Commission, draft articles 10 to 15 as submitted by the Special Rapporteur were referred to the Drafting Committee." Footnote 14 would remain.

Paragraph 13, as amended, was adopted.

Paragraphs 14 to 16

Paragraphs 14 to 16 were adopted.

Paragraphs 17 and 18

6. The CHAIRMAN drew attention to the corrigendum (A/CN.4/L.440/Corr.1) concerning paragraphs 17 and 18.

7. Mr. McCAFFREY (Special Rapporteur) said that the words "latter draft article", in the first sentence of paragraph 18, should be replaced by "draft article 18 [19]", and that "article 18 [19]", in the second sentence, should be replaced by "that article".

8. Mr. CALERO RODRIGUES proposed that the words "suggested that he make", in the second sentence of paragraph 18, should be replaced by "indicated that he would make".

It was so agreed.

Paragraph 17 and paragraph 18, as amended, were adopted.

Paragraph 19

Paragraph 19 was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.440/Add.1 and 2)

Paragraphs 20 to 30*h* (A/CN.4/L.440/Add.1)

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

9. Mr. McCAFFREY (Special Rapporteur) said that the words "on those subtopics" should be added at the end of the paragraph.

Paragraph 21, as amended, was adopted.

Paragraphs 22 to 25*b*

*Paragraphs 22 to 25*b *were adopted.*

Paragraph 25*c*

10. Mr. McCAFFREY (Special Rapporteur) said that the last part of paragraph 25*c*, from the words "The Special Rapporteur pointed out that the problem had been addressed . . .", should be deleted.

*Paragraph 25*c*, as amended, was adopted.*

Paragraphs 26 to 27*a*

*Paragraphs 26 to 27*a *were adopted.*

Paragraph 28

11. Mr. Sreenivasa RAO said that he would prefer the first sentence to be couched in more neutral terms and suggested that the words "expressed support for the general thrust" should be replaced by "dealt with the general thrust". Moreover, he wondered about the meaning to be attached to the expression "integrated treatment", in the same sentence.

12. Mr. AL-QAYSI said that the first sentence was simply an objective statement of fact. Perhaps Mr. Sreenivasa Rao could propose a sentence starting with the words "One member indicated . . .".

13. Mr. McCAFFREY (Special Rapporteur) pointed out that he had used the expression "integrated treatment" in his oral introduction of his fifth report (A/CN.4/421 and Add.1 and 2) and in the report itself, and it should be taken to mean treatment of the various sorts of water-related hazards in one article, namely article 22, and of the various sorts of water-related emergency situations in another article, namely article 23. If the word "integrated" did not seem felicitous, it would be possible to say: "including treating all types of hazards and dangers together in the draft articles".

14. Mr. Sreenivasa RAO proposed that paragraph 28 or a new paragraph 28 *bis* should contain a further sentence reading: "One member"—or "Some members" if others shared his point of view—"observed that the material submitted by the Special Rapporteur in his fifth report, while being very interesting, did not always appear relevant or lead to the conclusions and draft articles that were presented."

15. After an exchange of views in which Mr. McCAFFREY (Special Rapporteur), Mr. CALERO RODRIGUES, Mr. NJENGA and Mr. BENNOUNA (Rapporteur) took part, the CHAIRMAN suggested that the Commission should revert to paragraph 28 later.

It was so agreed.

Paragraph 28*a*

16. Mr. NJENGA proposed that, in view of the role played by international organizations, they should be mentioned in the phrase "would marshal both governmental and private resources".

17. Mr. McCAFFREY (Special Rapporteur) proposed that the phrase should be replaced by the formulation: "would marshal private resources as well as those of Governments and international organizations".

It was so agreed.

*Paragraph 28*a*, as amended, was adopted.*

Paragraph 28*b*

18. Mr. BENNOUNA (Rapporteur) proposed that an additional sentence should be inserted, reading: "It was also pointed out that the bilateral agreements cited contained very diversified obligations and could not serve as the basis for customary norms in this area."

19. Mr. TOMUSCHAT proposed that another sentence should be added, reading: "Other members felt that the source material referred to by the Special Rapporteur indicated at least certain modern trends in international law which the Commission should take into account."

20. After an exchange of views in which Mr. BARBOZA and Mr. BEESLEY took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt both of the proposed sentences in the form of a separate paragraph.

It was so agreed.

21. Mr. Sreenivasa RAO proposed that the first two sentences of paragraph 28*b* should be amended to read: "It was questioned whether the bilateral treaties cited by the Special Rapporteur could be treated as proper precedents for the envisaged multilateral instrument."

22. After an exchange of views in which Mr. NJENGA, Mr. AL-QAYSI, Mr. BARBOZA and Mr. McCAFFREY (Special Rapporteur) took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Sreenivasa Rao's amendment and to insert the words "and case material" after the words "bilateral treaties".

It was so agreed.

*Paragraph 28*b*, as amended, was adopted.*

Paragraph 28*c*

*Paragraph 28*c *was adopted.*

Paragraph 28*d*

23. Mr. REUTER said that, to remove any ambiguity, the word "stricter" in the first sentence should be avoided.

24. After an exchange of views in which Mr. REUTER, Mr. ARANGIO-RUIZ, Mr. BARSEGOV, Mr. Sreenivasa RAO, Mr. BENNOUNA (Rapporteur) and Mr. McCAFFREY (Special Rapporteur) took part, the CHAIRMAN said that, if there were no objections, he would take it that the

Commission agreed to replace the word "stricter" by "higher".

It was so agreed.

*Paragraph 28*d, *as amended, was adopted.*

New paragraph 28*d bis*

25. Mr. Sreenivasa RAO proposed the addition of the following new paragraph 28*d bis*:

"One member expressed the view that the draft articles should not impose on States obligations which it would be known in advance they could not discharge in view of the complexity of factors contributing to water-related hazards. The answer for meeting and remedying such situations lay in the field of education, assistance, prevention and transfer of experience and technology."

*New paragraph 28*d bis *was adopted.*

Paragraph 28 (*concluded*) and new paragraph 28 *bis*

26. Mr. McCAFFREY (Special Rapporteur) said that, further to consultations with the members concerned, it was proposed that paragraph 28 should end after the first sentence and that the remainder of the paragraph should constitute a paragraph 28 *bis*, opening with the following new text, which had been proposed by Mr. Sreenivasa Rao and was supported by Mr. Calero Rodrigues and Mr. Njenga: "Some members were, however, of the view that the material submitted by the Special Rapporteur in his fifth report did not always appear relevant or lead to the conclusions and draft articles that were presented." Paragraph 28 *bis* would end with a sentence which Mr. Pawlak wished to insert in connection with secondary rules.

It was so agreed.

27. Mr. PAWLAK proposed the addition of the following sentence at the end of paragraph 28 *bis*:

"The view was, however, expressed that secondary rules should eventually be included in the draft articles and that efforts in that regard should be harmonized with similar endeavours in connection with the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law."

It was so agreed.

Paragraph 28 and new paragraph 28 bis, *as amended, were adopted.*

Paragraph 28*e*

28. Mr. YANKOV said that, since the new paragraph 28*d bis* started with the words "One member . . .", another formulation should be found for the beginning of paragraph 28*e*.

29. Mr. McCAFFREY (Special Rapporteur) proposed the words "It was suggested by another member . . .".

It was so agreed.

*Paragraph 28*e, *as amended, was adopted.*

Paragraph 29

Paragraph 29 was adopted.

Paragraph 29*a*

30. Mr. NJENGA, pointing out that the problem of water-borne diseases was of crucial importance in Africa, asked what the Special Rapporteur's position was on that point, for it was not clear from paragraph 29*a* whether the Special Rapporteur wanted the problem to be specifically mentioned in the text of draft article 22.

31. Mr. McCAFFREY (Special Rapporteur), answering in the affirmative, said that Mr. Njenga's fears could be allayed by replacing the word "could", in the first part of the second sentence, by "should".

It was so agreed.

*Paragraph 29*a, *as amended, was adopted.*

Paragraph 29*b*

32. Mr. Sreenivasa RAO said it was surprising that no mention was made of his proposal to replace the concept of co-operation "on an equitable basis" by that of "mutual reimbursement".

33. Mr. McCAFFREY (Special Rapporteur) suggested that, in order to take account of that proposal, the third sentence of paragraph 29*b* should be amended to read: "It was also proposed to add a reference to other forms of co-operation, including mutual reimbursement."

It was so agreed.

*Paragraph 29*b, *as amended, was adopted.*

Paragraph 29*c*

*Paragraph 29*c *was adopted.*

Paragraph 29*d*

34. Mr. BENNOUNA (Rapporteur) said that, to make the reader's task easier, it should be made clear that the subparagraph concerned was paragraph 2 (*a*) of draft article 22.

*Paragraph 29*d, *as amended, was adopted.*

Paragraph 29*e*

*Paragraph 29*e *was adopted.*

Paragraph 29*f*

35. Mr. BENNOUNA (Rapporteur) said that, once again, it should be made clear that the subparagraph concerned was paragraph 2 (*b*) of draft article 22. Moreover, the expression "something like", in the last sentence, was rather trite.

36. Mr. McCAFFREY (Special Rapporteur) said that the latter expression could be replaced by "for example".

It was so agreed.

*Paragraph 29*f, *as amended, was adopted.*

Paragraph 29*g*

*Paragraph 29*g *was adopted.*

Paragraphs 29*h* and 29*i*

37. Mr. BENNOUNA (Rapporteur), noting that the two paragraphs dealt with the same provision, proposed that they be merged.

It was so agreed.

*Paragraphs 29*h *and 29*i, *as amended, were adopted.*

Paragraph 30

38. Mr. PAWLAK proposed the addition of the following sentence at the end of paragraph 30: "The view was also expressed that it would be preferable for all provisions relating to the pollution of watercourses to be included in one sub-chapter of the draft articles."

It was so agreed.

Paragraph 30, as amended, was adopted.

Paragraphs 30*a* and 30*b*

39. Mr. EIRIKSSON and Mr. BENNOUNA (Rapporteur) proposed that paragraph 30*a* be deleted.

40. Mr. Sreenivasa RAO pointed out that he had commented, in connection with paragraphs 1 and 2 of draft article 23, that identification of the potentially affected State could well be very difficult. That was not simply a "suggestion of a basically drafting nature".

41. After a brief discussion, the CHAIRMAN proposed that paragraph 30*a* be deleted and that the first sentence of paragraph 30*b* be amended to read: "While comments on paragraphs 1 and 2 were basically of a drafting nature, the discussion of paragraph 3 covered a broad range of issues."

It was so agreed.

*Paragraph 30*b*, as amended, was adopted.*

Paragraph 30*c*

42. Mr. McCAFFREY (Special Rapporteur) said that the end of the first sentence should be amended to read: "... not parties to the present articles could not be bound by them".

*Paragraph 30*c*, as amended, was adopted.*

Paragraphs 30*d* and 30*e*

*Paragraphs 30*d *and 30*e *were adopted.*

Paragraph 30*f*

43. Mr. BENNOUNA (Rapporteur) noted that the second sentence, which spoke of "modalities through which assistance could be rendered", glossed over the fact that the safeguard clause that was the subject of the proposed new article 23 *bis* would also apply in other fields, such as means of prevention.

44. Mr. REUTER said that he shared the Rapporteur's view and proposed that the words "to deal with that issue as well as others", in the last sentence of paragraph 30*f*, should be replaced by "to deal with all common problems".

It was so agreed.

*Paragraph 30*f*, as amended, was adopted.*

Paragraph 30*g*

45. Mr. PAWLAK, pointing out that he had spoken on the question discussed in paragraph 30*g*, proposed that the words "long-term legal measures", in the second sentence, should be replaced by "long-term agreements".

46. Mr. McCAFFREY (Special Rapporteur) said that he would prefer to retain the expression "legal measures", which had been used by Mr. Barsegov. Mr. Pawlak's point could be met by adding the phrase "in particular international agreements" at the end of the second sentence.

It was so agreed.

47. Mr. BENNOUNA (Rapporteur) said that paragraph 30*g* was not satisfactory, for it seemed that the question of substance mentioned in the first sentence was placed on a par with the "drafting suggestions" referred to in the last sentence.

48. The CHAIRMAN proposed that the last sentence should be deleted.

It was so agreed.

*Paragraph 30*g*, as amended, was adopted.*

Paragraph 30*h*

*Paragraph 30*h *was adopted.*

49. Mr. RAZAFINDRALAMBO said it was surprising that paragraph 30*h* was not followed by a statement of what action the Commission had taken regarding draft articles 22 and 23.

50. Mr. McCAFFREY (Special Rapporteur) pointed out that paragraph 23 stated that the Commission had decided "to refer draft articles 22 and 23 to the Drafting Committee for consideration in the light of the debate".

51. After an exchange of views between Mr. McCAFFREY (Special Rapporteur), Mr. NJENGA and Mr. CALERO RODRIGUES on whether the information contained in paragraph 23 should be repeated, the CHAIRMAN suggested that the secretariat should look into the precedents and adopt the solution usually followed by the Commission.

It was so agreed.

52. Mr. DÍAZ GONZÁLEZ recalled that, at the opening meeting of the session (2095th meeting, paras. 2 *et seq.*), he had reported on the way in which the General Assembly had taken note of the Commission's report on its fortieth session and had stated that, in fact, the Sixth Committee had discussed the analyses by the special rapporteurs and their recommendations, but never the report of the Commission itself. In his opinion, the cause lay in the form of the Commission's report. Chapter VII currently under consideration was a perfect example.

53. Citing in that regard a number of paragraphs in document A/CN.4/L.440/Add.1, he pointed to the constant repetition of formulas such as "The Special Rapporteur noted", "The Special Rapporteur explained", "The Special Rapporteur had no objection", or again, "One member suggested", "Another member was of the view", and so on. Nowhere did the document indicate that the Commission had decided, or said, or proposed anything. It spoke only of the discussions between the Commission and the Special Rapporteur and the only conclusions it contained were those of the Special Rapporteur.

54. However, the Sixth Committee of the General Assembly was interested in what the International Law Commission decided, not its Special Rapporteur, who was only a creature of the Commission. If the General Assembly was to take an interest in what the Commission had to say, it should receive reports, as it had in the past, of the opinion of the majority of the Commission's members, not an accumulation of opinions of individuals. The example to follow was chapter II of the draft report (A/CN.4/L.435 and Add.1-4 and Add.4/Corr.1), on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. If the Commission insisted on drafting its reports in the form it had given to chapter VII, it would lose all credibility.

55. Mr. McCAFFREY (Special Rapporteur) pointed out that chapter II of the draft report seemed to take the form sought by Mr. Díaz González because it presented a set of draft articles on which the Commission had taken its decisions on second reading. Chapter VII, which had just been criticized, was in keeping with the practice followed so far by the Commission.

56. The CHAIRMAN said that the Commission had taken note of the comments made by Mr. Díaz González, which

it would discuss in the debate on methods of work. They were similar comments to those already made on a number of occasions by the Rapporteur of the Commission, to the effect that the special rapporteurs and the Rapporteur should decide beforehand on a uniform presentation for the various chapters of the report.

The meeting rose at 1.05 p.m

2142nd MEETING

Tuesday, 18 July 1989, at 3.10 p.m.

Chairman: Mr. Bernhard GRAEFRATH

later: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its forty-first session (*continued*)

CHAPTER I. ***Organization of the session*** (A/CN.4/L.434)

Paragraphs 1 to 16

Paragraphs 1 to 16 were adopted.

Chapter I of the draft report was adopted.

Mr. Sreenivasa Rao, First Vice-Chairman, took the Chair.

CHAPTER IX. ***Other decisions and conclusions of the Commission*** (A/CN.4/L.442)

A. Programme, procedures and working methods of the Commission, and its documentation

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

1. Mr. McCAFFREY said that the first sentence was repetitive and self-congratulatory. He proposed that the first two sentences should be replaced by the following text:

"The first of those goals has now been attained. The Commission intends to make every effort to complete the second reading of the draft articles on jurisdictional immunities of States and their property at its forty-second session, in 1990."

It was so agreed.

Paragraph 7, as amended, was adopted.

Paragraph 8

2. Mr. McCAFFREY proposed that paragraph 8 should be deleted.

It was so agreed.

Paragraphs 9 and 10

Paragraphs 9 and 10 were adopted.

Paragraph 11

3. Mr. PAWLAK proposed that the words "over a number of meetings" should be inserted between the words "views" and "on".

It was so agreed.

Paragraph 11, as amended, was adopted.

Paragraphs 12 and 13

Paragraphs 12 and 13 were adopted.

Paragraph 14

4. Mr. EIRIKSSON proposed that a footnote should be inserted after the word "achieved", in the first sentence, listing the draft articles currently before the Drafting Committee.

It was so agreed.

5. Mr. TOMUSCHAT suggested that the words "its special role", in the second sentence, should be replaced by "the latter's special role".

It was so agreed.

Paragraph 14, as amended, was adopted.

Paragraph 15

6. After a discussion in which Mr. PAWLAK, Mr. DÍAZ GONZÁLEZ, Mr. YANKOV, Mr. AL-QAYSI, Mr. ROUCOUNAS, Mr. BARBOZA, Mr. BENNOUNA (Rapporteur), Mr. JACOVIDES and Mr. McCAFFREY took part, Mr. CALERO RODRIGUES proposed that the subheading preceding paragraph 15 should be amended to read: "Relationship between the Commission and the General Assembly" and Mr. ARANGIO-RUIZ proposed that the first sentence should be deleted and that the second sentence should begin: "The Commission notes with satisfaction . . . ".

It was so agreed.

Paragraph 15, as amended, was adopted.

Paragraph 16

7. Mr. EIRIKSSON proposed that the phrase "in acquainting themselves with the content of the report", in the first part of paragraph 16, should be deleted.

It was so agreed.

8. Mr. CALERO RODRIGUES proposed that the words "Rapporteurs of", immediately after the deleted phrase, should also be eliminated.

Paragraph 16, as amended, was adopted.

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

9. Mr. McCAFFREY proposed the insertion at the end of paragraph 18 of the following additional text, which could alternatively take the form of a new paragraph 18 *bis*:

"Some members, however, without minimizing the magnitude and complexity of the topics on the Commission's agenda, continued to believe that a continuous 12-week session was too long, since it was highly inconvenient for some members to be away from their regular positions for that length of time and since, in their view, the

Commission's work could be accomplished more efficiently in one or more shorter sessions. In that connection, these members emphasized the importance of reducing the number of topics on the Commission's agenda."

He had been authorized to express Mr. Al-Qaysi's support for that proposal, which reflected views that had been put forward on many occasions in the Planning Group—views that should be made known to the General Assembly.

10. Mr. DÍAZ GONZÁLEZ said that he was completely opposed to the proposal.

11. Mr. EIRIKSSON said that the right place for discussing the matters mentioned in the proposal was the Planning Group. If and when a decision was reached in that body, it could be incorporated in the Commission's report.

12. Mr. BARSEGOV said that he was categorically opposed to any proposal for splitting the Commission's 12-week session into two shorter sessions. He was also opposed to inserting the proposed additional text.

13. Mr. MAHIOU said that the Commission had in the past insisted on the need for a 12-week session. It would therefore be most inconsistent to suggest that its work could be "accomplished more efficiently in one or more shorter sessions". Nor would it be desirable to say that a 12-week session meant that "it was highly inconvenient for some members to be away from their regular positions". Those words placed too much emphasis on the personal convenience of members of the Commission. He had serious doubts about the whole proposal; perhaps it should be considered at the next session.

14. Mr. NJENGA requested some clarification. Was it being suggested that the Commission should meet for less than 12 weeks in all, or was it simply a question of dividing the 12 weeks into two sessions? The second sentence of paragraph 18 stated that the Commission had "made full use of the time and services made available to it during its current session", and the first sentence explained that "the magnitude and complexity of the subjects on the agenda make it desirable that the usual duration of the session be maintained". The proposed additional text would contradict those affirmations.

15. Furthermore, the proposal spoke of "the importance of reducing the number of topics on the Commission's agenda". Actually, all of the items on the agenda had been assigned to the Commission by its parent body, the General Assembly, and formed part of the Commission's mandate. He failed to see how any of them could be eliminated. The proposal was not a timely one and should be rejected.

16. Mr. BARBOZA said that he agreed with those members who had pointed to the contradiction between the proposal and the statement in paragraph 18 that the 12-week session was necessary and should be maintained. As for the suggestion to split the session into two shorter ones, it had been made over and over again in the past 10 years and had always been rejected on practical grounds. The special rapporteurs had to await the results of the discussions in the Sixth Committee of the General Assembly before they could prepare their reports, which could only be completed during the first three or four months of the year. Hence the reports were ready only just in time for the start of the Commission's 12-week session. Trying to change the present system was simply not a practical proposition. The Commission's working methods were not perhaps ideal, but they were the least unsatisfactory that could be devised in view of the existing constraints.

17. Mr. McCAFFREY pointed out that most speakers were dealing with the substance of the suggestions regarding the length of the Commission's session. His proposal related not to the substance, but simply to the inclusion of a passage reflecting the views held by some members.

18. Mr. BARSEGOV said that it was not clear from Mr. McCaffrey's proposal whether it was suggested to reduce the length of the session or to split it into two shorter sessions.

19. Mr. McCAFFREY said that the emphasis was on two shorter sessions, but they could well be of eight weeks each, making a total of 16 weeks.

20. Mr. BARSEGOV pointed out that the statement to the effect that the Commission's work could be accomplished more efficiently "in one or more shorter sessions" could be understood as a proposal to curtail the Commission's 12-week session—an outcome which few, if any, of the members of the Commission would want.

21. Mr. TOMUSCHAT said he agreed that, in matters such as the length of its session, the Commission should speak with one voice on the basis of decisions taken in the Planning Group. Nevertheless, as a matter of principle, the views expressed by some members had to be reflected in the Commission's report. As far as the wording of the proposal was concerned, he agreed that the reference to "one or more shorter sessions" seemed to place the emphasis on reducing the overall length of the session.

22. Mr. DÍAZ GONZÁLEZ said that the suggestions regarding the length of the Commission's session had been debated at great length in the Planning Group. If certain members of the Planning Group had different views on that point and insisted on them being reflected in the Commission's report, he would suggest that it be done under their names.

23. Mr. ARANGIO-RUIZ said that the Commission had a long tradition of holding 12-week sessions. Candidates for election to the Commission were well aware of that fact. When elected, they should be in a position to make the necessary arrangements to participate in the Commission's work. It would be very dangerous for the Commission to suggest in its report that its sessions were too long. He appealed to Mr. McCaffrey to withdraw his proposal.

24. Mr. McCAFFREY said that he did not intend to discuss the substantive issue of the length of the Commission's session. All he wanted was for the Commission's report to reflect views held by some of its members. He knew of several members who shared the views of Mr. Al-Qaysi and himself on the matter.

Mr. Graefrath resumed the Chair.

25. Mr. BENNOUNA (Rapporteur) said that, from informal consultations he had held, it seemed that the general opinion was that the Commission should continue to meet for 12 weeks a year. The question, however, was whether those 12 weeks should be organized in two separate sessions. It was considered undesirable to refer to such a possibility in the Commission's report, since that might create an unwanted precedent as, traditionally, minority views were not reflected in the chapter of the report dealing

with the organization of work. Alternatively, the Commission could take a vote on the issue, but, there again, traditionally the Commission did not do so unless it was absolutely necessary.

26. In the circumstances, he would suggest that the most prudent course would be to retain paragraph 18 in its present form, to reflect the views of Mr. McCaffrey and those who supported his proposal in the summary record of the meeting, and to request the Planning Group to review the matter at the next session so as to arrive at a decision in the light of the practical and financial considerations involved.

27. Mr. DÍAZ GONZÁLEZ said that that was an attractive suggestion. Indeed, as far as the summary record was concerned, why not even go so far as to suggest splitting the 12 weeks into four sessions, rather than two, thereby considerably increasing the already high travel costs for the United Nations?

28. Mr. ARANGIO-RUIZ, agreeing that paragraph 18 should remain as drafted, stressed that any attempt to modify the 12-week session, directly or indirectly, would be dangerous from the standpoint of the Commission's productivity.

29. Mr. SOLARI TUDELA said that he would have no difficulty in approving paragraph 18, provided that members' positions were reflected in the summary record of the meeting. For his own part, he considered that Mr. McCaffrey had made a reasonable suggestion and he did not understand how it could be construed as a proposal to reduce the length of the session. Two sessions would in fact give fresh impetus to the work of the Commission and make things easier for the special rapporteurs. It would also be wholly in keeping with the new interest in international law.

30. Mr. McCAFFREY said that he was happy to bow to the Rapporteur's eminently sensible suggestion (para. 26 above), but trusted that the matter could be reconsidered at the Commission's next session.

Paragraph 18 was adopted.

Paragraph 19

31. Mr. EIRIKSSON proposed that the last two sentences should be combined and be amended to read: "It is of the view that ... should be maintained and that the Secretariat should add to the list such documents as may be recommended by special rapporteurs and other members of the Commission."

It was so agreed.

Paragraph 19, as amended, was adopted.

Paragraph 20

32. Mr. McCAFFREY proposed that the words "should be better known and more widely appreciated", in the first sentence, should be replaced by "should be made known as widely as possible". In addition, the second and third sentences should be combined and be amended to read:

"It therefore welcomes ... at the United Nations Office at Geneva, which provided the media with background information on the current session as well as a description of the results achieved in the course of the session and organized a press briefing."

33. Mr. DÍAZ GONZÁLEZ said it went without saying that the Commission was supposed to make its work known. There was no need to tell the General Assembly that. Paragraph 20 made it look as though the members of the Commission were fishing for compliments; he therefore proposed that it be deleted in its entirety.

34. Mr. BEESLEY said that it was not so much a matter of publicizing the Commission itself as of making the results of its labours more widely known, something which was important. At the same time, he considered that paragraph 20 should be couched in neutral terms and that there was no need to enter into details about press briefings.

35. Mr. NJENGA said that, as one who came from a region where it was extremely difficult to get information about anything, let alone about the International Law Commission, he considered that the Commission's report should be made more widely available, in particular to universities in the third world. In his view, paragraph 20 was extremely important, although the reference to a press briefing could perhaps be omitted.

36. Mr. SOLARI TUDELA said that, while it was indeed important to disseminate information about the Commission, such dissemination might have the unwanted effect of disclosing that some topics had been under consideration for 20 years, without any result. Those who did not appreciate just how complex some topics were might not understand why.

37. Mr. BARSEGOV said that all over the world, and particularly in the Soviet Union, interest in international law was growing apace. It would be very sad, therefore, if members of the Commission did not want its work to be publicized.

38. Mr. CALERO RODRIGUES said that he was puzzled by the interest aroused by paragraph 20. Of course it was important to make the work of the United Nations in the field of international law known as widely as possible; in fact, its work was already known to centres of learning and to people in government circles. But the Commission could not expect to hit the headlines; he could not help wondering in that respect whether the recent press briefing in Geneva had had any effect at all. Consequently, while he would have no objection if members wanted to retain paragraph 20, he would prefer to delete it.

39. Mr. FRANCIS, endorsing Mr. Njenga's remarks, said that it would be entirely wrong to delete paragraph 20.

40. Mr. ARANGIO-RUIZ, agreeing with Mr. Díaz González and Mr. Calero Rodrigues, said that it was not for the Commission but for its parent body, the General Assembly, to publicize the work of the Commission, if it wished to do so.

41. Mr. BENNOUNA (Rapporteur) said that the agenda of the Sixth Committee of the General Assembly always included an item on dissemination of knowledge about international law. The question was thus already covered by the General Assembly and it was not for the Commission, the Assembly's subsidiary body, to concern itself with the matter. Moreover, it would be dangerous for the Commission to deal directly with the media, a task that properly fell to the General Assembly. While the recent press briefing had been useful for the purposes of providing information, it would be preferable not to place too much

emphasis on it, since a conflict could arise with the obligation of reserve incumbent on members of the Commission. He would therefore suggest that paragraph 20 be deleted.

42. The CHAIRMAN suggested that the words "should be better known and more widely appreciated", in the first sentence of paragraph 20, should be replaced by "should be made known as widely as possible", as proposed by Mr. McCaffrey, and that the paragraph should end with the words "United Nations Office at Geneva", in the second sentence, the remainder of the paragraph being deleted.

43. Mr. BEESLEY, agreeing with that suggestion, proposed that the words "and in particular", in the first sentence, should be replaced by "including".

44. Mr. BARBOZA said he did not agree that the Commission could not disseminate information on topics it had under consideration. Indeed, it had every right to do so. Once again, it seemed that the whole point of the discussion had been missed. It was not a question of whether the Commission had a right to disseminate information about international law; rather, it was part of its mandate under the Charter of the United Nations to do so. He could, however, agree to the wording suggested by the Chairman, provided that his own views were reflected in the summary record of the meeting.

45. Mr. ARANGIO-RUIZ said he continued to think that paragraph 20 should be deleted in its entirety. It would be unwise to encourage the idea that everything produced by the Commission automatically formed part of international law.

46. Mr. DÍAZ GONZÁLEZ said that, while he would not oppose the wording suggested by the Chairman, he would none the less point out that it was not the Commission which held the view expressed in the first sentence of paragraph 20, but the General Assembly itself. Indeed, the General Assembly regarded the development of international law as so important that it had established the International Law Commission for that very purpose. Obviously, if the media so requested, the Commission must provide information about its work, but it should not go so far as actually to tell the General Assembly that it was so important that it had to hold frequent press briefings. His concern was to avoid giving the General Assembly an unfortunate impression about what the Commission was doing.

47. Mr. RAZAFINDRALAMBO, agreeing with the compromise formula suggested by the Chairman, proposed that the words "It therefore welcomes", at the beginning of the second sentence, should be replaced by "It noted with interest".

48. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 20 as amended by him (para. 42 above), and as further amended by Mr. Beesley and Mr. Razafindralambo (paras. 43 and 47 above).

It was so agreed.

Paragraph 20, as amended, was adopted.

Paragraph 21

Paragraph 21 was adopted.

Section A, as amended, was adopted.

B. Co-operation with other bodies

Paragraphs 22 to 24

Paragraphs 22 to 24 were adopted.

Section B was adopted.

C. Date and place of the forty-second session

Paragraph 25

49. The CHAIRMAN said that the text did not incorporate the dates for the forty-second session: the Commission still had to decide whether it wished to hold the session from 1 May to 20 July 1990 or from 7 May to 27 July 1990. He understood that, because of difficulties in servicing meetings of many bodies that coincided at the end of July, the Secretariat would prefer the starting-date to be 1 May, but that a small majority of members of the Commission favoured 7 May.

50. Mr. KOTLIAR (Secretary to the Commission) said that he wished to draw attention to a statement made by the Legal Counsel at the first meeting of the Planning Group. The Legal Counsel had indicated that he was aware of the inconvenience to some members of the Commission resulting from the change in the opening date of its 1989 session, but that the United Nations Office at Geneva, with its limited resources, had been experiencing serious difficulties in providing conference services to meetings of United Nations bodies, especially during the summer period. The Conference Services of the Secretariat in Geneva had requested that the 1989 session be advanced by one week so as to alleviate the pressure under which the translation, interpretation and technical services had to work during the last days of July, and thereby to secure a 12-week session for the Commission. The Conference Services had already, for the same reasons, expressed the wish that the 1990 session start on 1 May. An earlier start of that kind would automatically lead to earlier circulation of the Commission's report—a development which many Governments and representatives in the Sixth Committee of the General Assembly had indicated they would welcome.

51. The Conference Services of the Secretariat in Geneva wished to make it clear that they had welcomed the decision to advance the starting-date of the current session. The relatively smooth flow of final documentation the Commission was now receiving was a direct consequence of that decision. The difficulties arose partly because of a sharp reduction in staff, but another major factor was the scheduling of meetings of the Human Rights Committee and the Economic and Social Council so that they coincided with the latter part of the Commission's session. The final week of July saw an extremely heavy work-load of draft resolutions, reports and other documents which the Languages Service was hardly able to handle with its extremely limited resources. In addition, that period coincided with the final weeks of the Conference on Disarmament and with the increasingly heavy work-load of pre-session documentation for the human rights bodies meeting in August. For all those reasons, it was strongly urged that the Commission's forty-second session be scheduled from 1 May to 20 July 1990. A practical consequence of any other decision would be that the Commission would almost certainly not receive its reports in all working languages at the appropriate times.

52. With all due respect for the opinion of the majority, he would be compelled to bring to the attention of the

Committee on Conferences and the Sixth Committee the serious difficulties in servicing meetings of the Commission during the last week of July, as described by the Secretariat of the United Nations Office at Geneva.

53. Mr. McCAFFREY said it seemed odd, indeed, that the bodies that were meant to service the Commission were in effect determining when the Commission would meet.

54. Mr. BENNOUNA (Rapporteur) noted that, in 1988, the Commission had chosen a starting-date of 8 May 1989 for its current session, but that decision had been overridden. An attempt was now being made to gain the victim's advance consent to its victimization. Whatever technical problems might be involved for the Secretariat services, the Commission must be guided only by its own preferences in choosing the starting-dates for its sessions. It would then be for the Committee on Conferences to determine, in terms of existing resources, whether the Commission's desiderata could be met.

55. Mr. DÍAZ GONZÁLEZ said that he endorsed the comments made by the Rapporteur. Although the Secretariat's technical difficulties should be taken into account, the Commission must be left free to make its own decision about the starting-dates.

56. Mr. SOLARI TUDELA said that he fully agreed with the Rapporteur.

57. Mr. ARANGIO-RUIZ said that he, too, agreed with the Rapporteur, but thought the Commission should make it clear that it preferred a specified date subject to administrative and technical feasibility.

58. The CHAIRMAN suggested that paragraph 25 should be amended to read:

> "The Commission took note that its next session could be serviced at the United Nations Office at Geneva only from 1 May to 20 July 1990."

59. Mr. DÍAZ GONZÁLEZ said that the Commission should not "take note" of anything: it should take a decision and then leave it to the Sixth Committee and the Committee on Conferences to make the appropriate arrangements.

60. Mr. YANKOV said that, in the Commission's 40-year history, it had always clearly indicated its preferences regarding the dates for its future sessions, and it should not change that practice now. To his knowledge, no United Nations body that met in regular session ever failed to set precise dates for its sessions.

61. Mr. BARBOZA said that he endorsed the comments made by Mr. Yankov.

62. Mr. BENNOUNA (Rapporteur) said that he, too, agreed with Mr. Yankov. He could not accept the manipulation of the Commission by the Secretariat, which was there to serve the Commission, not to dictate its decisions. The Commission was an independent body and should make its own decisions, not simply take note of decisions by the Secretariat.

63. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to leave the text of paragraph 25 unchanged, and to insert the dates "1 May" and "20 July".

It was so agreed.

Paragraph 25 was adopted.

Section C was adopted.

The meeting rose at 6.10 p.m.

2143rd MEETING

Wednesday, 19 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its forty-first session (*continued*)

CHAPTER IX. ***Other decisions and conclusions of the Commission*** (concluded) (A/CN.4/L.442)

D. Representation at the forty-fourth session of the General Assembly

Paragraph 26

Paragraph 26 was adopted.

Section D was adopted.

E. International Law Seminar

1. Mr. EIRIKSSON recalled that it had been decided at the previous session to include in the Commission's report a list of all those who had participated in the International Law Seminar, from its first session until the present.

2. The CHAIRMAN suggested that the Planning Group should be reminded of that decision at the next session.

It was so agreed.

Paragraphs 27 to 30

Paragraphs 27 to 30 were adopted.

Paragraph 31

3. Mr. MAHIOU said that, in his view, it was not necessary to explain the details of the internal organization of the Seminar to the General Assembly. He therefore proposed that paragraph 31 be deleted.

It was so agreed.

Paragraph 32

Paragraph 32 was adopted.

Paragraph 33

4. Mr. BENNOUNA (Rapporteur) proposed that paragraph 33 be deleted for the reason stated by Mr. Mahiou.

It was so agreed.

Paragraphs 34 to 37

Paragraphs 34 to 37 were adopted.

Section E, as amended, was adopted.

F. Gilberto Amado Memorial Lecture

Paragraphs 38 to 40

Paragraphs 38 to 40 were adopted.

Section F was adopted.

Chapter IX of the draft report, as amended, was adopted.

CHAPTER VII. ***The law of the non-navigational uses of international watercourses*** (concluded)* (A/CN.4/L.440 and Corr.1 and Add.1 and 2)

B. Consideration of the topic at the present session (*concluded*) (A/CN.4/L.440/Add.1 and 2)

Paragraphs 30*i* to 33 (A/CN.4/L.440/Add.2)

*Paragraphs 30*i *to 33 were adopted.*

Section B, as amended, was adopted.

C. Draft articles on the law of the non-navigational uses of international watercourses (A/CN.4/L.440/Add.2)

Paragraph 34

Paragraph 34 was adopted.

Section C was adopted.

D. Points on which comments are invited (A/CN.4/L.440/Add.2)

Paragraph 35

Paragraph 35 was adopted.

Section D was adopted.

5. Mr. McCAFFREY (Special Rapporteur) said that, having considered chapter VII as a whole, the Commission might wish to shorten section A (Introduction) somewhat (A/CN.4/L.440 and Corr.1). He therefore proposed that, in paragraph 14, the list of titles of articles 2 to 7—which were reproduced in section C—should be deleted and that paragraph 19 should be simplified in the same way, only the first sentence being retained. If the Commission agreed to that proposal, the footnotes to the two paragraphs would also have to be amended so as to refer to section C.

It was so agreed.

Chapter VII of the draft report, as amended, was adopted.

CHAPTER II. ***Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier*** (A/CN.4/L.435 and Add.1-4 and Add.4/Corr.1)

D. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.435/Add.1-4 and Add.4/Corr.1)

6. Mr. YANKOV (Special Rapporteur) said that sections A to C of chapter II would shortly be issued in document A/CN.4/L.435. They would contain a historical review of the Commission's work on the topic, some observations of a methodological nature, including an analysis of the concept of functional necessity, and the recommendation addressed to the General Assembly by the Commission.

7. Section D, now before the Commission, consisted of the texts of the draft articles in their final form and of the draft Optional Protocols, as well as the commentaries thereto, incorporating the comments made in the Drafting Committee and in plenary.

Introductory paragraph (A/CN.4/L.435/Add.1)

The introductory paragraph was adopted.

Commentary to article 1 (Scope of the present articles)

Paragraph (1)

8. Mr. TOMUSCHAT proposed that the first sentence should be amended to read: "The general purpose of the present draft articles is to establish, within certain limits to be mentioned below, a comprehensive and uniform régime for all kinds of couriers and bags employed by States for official communications."

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

9. Mr. TOMUSCHAT proposed that, in the second sentence, the words "extremely high" should be replaced by "very high" and the words "a truly universal network" by "an almost universal network", and that the words "by and large, and", in the third sentence, should be deleted.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

10. Mr. BENNOUNA (Rapporteur) noted that paragraph (3) referred to draft Optional Protocol One on the status of the courier and the bag of special missions, but not to draft Optional Protocol Two on the status of the courier and the bag of international organizations of a universal character.

11. Mr. YANKOV (Special Rapporteur) pointed out that the second optional protocol was referred to in paragraph (2) of the commentary to article 2.

12. Mr. DÍAZ GONZÁLEZ proposed that, throughout the Spanish text of chapter II, the words *los correos y las valijas* should be used instead of *los correos y valijas*.

13. Mr. AL-QAYSI said that, in the English text, the word "couriers" should be used in the plural.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

14. Mr. BENNOUNA (Rapporteur) proposed that the words "the state of" should be added before "customary international law".

Paragraph (4) was approved.

Paragraph (5)

15. Mr. TOMUSCHAT said that he doubted whether the Latin expression *inter se* would be understandable to the non-specialist reader.

16. Mr. YANKOV (Special Rapporteur) proposed that, after the expression *inter se*, the following phrase should be added by way of explanation: "i.e. communications between the missions, consular posts or delegations situated in one State with the missions, consular posts or delegations situated in another State".

17. Mr. REUTER said that, in his view, the expression "lateral communications" would be explicit enough.

18. The CHAIRMAN suggested that the Special Rapporteur, the Rapporteur and the secretariat should agree on the final form of wording.

* Resumed from the 2141st meeting.

Paragraph (5) was approved on that understanding.

Paragraph (6)

Paragraph (6) was approved.

The commentary to article 1, as amended, was approved.

Commentary to article 2 (Couriers and bags not within the scope of the present articles)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

The commentary to article 2 was approved.

Commentary to article 3 (Use of terms)

Paragraph (1)

19. Mr. EIRIKSSON said that he was not sure what the last sentence was supposed to mean. In his view, it should either be made clearer or be deleted.

20. Mr. YANKOV (Special Rapporteur) said that the sentence was meant to indicate to the reader that he should not expect to find in article 3 a definition of all the terms used in the draft without exception. The expression "host State", for example, which appeared only once, was defined in the relevant article.

21. Mr. AL-QAYSI proposed that the last two sentences of paragraph (1) should be combined and amended to read: "The definitions have been confined to the essential elements which typify the entities defined, leaving all other elements for inclusion in the relevant substantive articles."

22. Mr. CALERO RODRIGUES proposed that the last sentence should be amended to read: "Other definitional elements may be found in the relevant substantive articles."

23. Mr. YANKOV (Special Rapporteur) said that those two proposals could be combined in the following manner: ". . . defined, leaving all other definitional elements for inclusion in the relevant substantive articles".

24. Mr. EIRIKSSON proposed that the word "all" in the latter amendment should be deleted.

25. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (1) with the amendments proposed by the Special Rapporteur and Mr. Eiriksson.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

26. Mr. TOMUSCHAT said that, in his view, the list, in the last sentence, of delegates, deputy delegates, advisers, technical experts and secretaries of delegations was unnecessary. It was intended to explain what was meant by the term "representatives", which was defined in article IV, section 16, of the 1946 Convention on the Privileges and Immunities of the United Nations to include those same persons. A reference to that provision would be enough.

27. Mr. YANKOV (Special Rapporteur) said that it was for historical reasons that he had listed all the persons covered by the concept of "representative". That concept was only really explained in the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, since the 1975 Vienna Convention on the Representation of States gave a much more general definition. For the same historical reasons, he had used the term "Members" rather than "Member States", since, when the United Nations had been established, "Member" had been understood to mean what was now called "Member State".

28. Mr. EIRIKSSON said that neither paragraph (3) nor paragraph (9), in which the same expression was used, caused him any difficulty.

29. Mr. CALERO RODRIGUES suggested that the words "representatives of Members, delegates, deputy delegates, advisers, technical experts and secretaries of delegations", in the last sentence of paragraph (3), should be replaced by "'representatives of Members' (which includes delegates, deputy delegates, advisers, technical experts and secretaries of delegations)", in order simply to provide the reader with information.

30. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (3) with the amendment proposed by Mr. Calero Rodrigues and to amend the other paragraphs in which the same wording appeared accordingly.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were approved.

Paragraph (8)

31. Mr. EIRIKSSON proposed that the word "master", in the third sentence, should be replaced by "captain" and that the last sentence should be replaced by a reference to the article relating to the practices in question.

32. Mr. YANKOV (Special Rapporteur) said that it was customary in practice and English maritime law to speak of the "master" of a merchant ship. While he had deferred in the Drafting Committee to the wishes of those who had wanted the term "captain" to be used in the body of the draft, he would like to retain the word "master" in paragraph (8) of the commentary. As to Mr. Eiriksson's second proposal, he suggested that reference be made to article 26, on transmission of the diplomatic bag by postal service or any mode of transport.

33. Mr. CALERO RODRIGUES pointed out that paragraph (3) of the commentary to article 23 contained an explanation concerning the use of the terms "captain" and "master". Personally, he would prefer to retain the last sentence of paragraph (8) under consideration and simply to add a reference to article 26 in square brackets so as to provide the reader with as much information as possible.

34. Mr. AL-QAYSI said that it was difficult to see how the last part of paragraph (8), reading ". . . could appropriately be dealt with in a new article to be placed at the part of the draft articles which bears on the status of the diplomatic bag", could be replaced simply by a reference to article 26, as Mr. Eiriksson had proposed. That would be tantamount to saying that the Commission had known in advance that it would deal with the practices in question in article 26, whereas that had not been the case.

35. Mr. YANKOV (Special Rapporteur) proposed that the last part of paragraph (8) should be replaced by the following

text: ". . . could appropriately be dealt with in another article. Reference is made in this connection to article 26."

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were approved.

Paragraph (11)

36. Mr. McCAFFREY said that the third sentence was not clear. Both the courier who accompanied a bag and the courier sent by a State to take delivery of a bag should be mentioned.

37. Mr. CALERO RODRIGUES suggested that the words "whose function is precisely to accompany a bag", in that sentence, should be replaced by "whose function is always connected with a bag".

It was so agreed.

Paragraph (11), as amended, was approved.

Paragraph (12)

Paragraph (12) was approved.

Paragraph (13)

38. Mr. TOMUSCHAT proposed that the words "all the more", in the second sentence, should be replaced by "all the less".

39. Mr. McCAFFREY proposed that the word "especially" should be used instead.

40. Mr. EIRIKSSON proposed that the words "a generic term such as 'mission '", at the end of the second sentence, should be replaced by "a generic term, 'mission'".

41. Mr. RAZAFINDRALAMBO suggested that the dates of the conventions cited in the report should be indicated systematically.

42. Mr. YANKOV (Special Rapporteur) endorsed the proposals made by Mr. McCaffrey and Mr. Eiriksson. So far as Mr. Razafindralambo's proposal was concerned, since the titles of conventions were given in full when first cited in each chapter, he thought it would be better thereafter to use shorter titles without any date, where appropriate.

The amendments by Mr. McCaffrey and Mr. Eiriksson were adopted.

Paragraph (13), as amended, was approved.

Paragraph (14)

43. Mr. EIRIKSSON proposed the deletion of the words "on a very superficial level", which, being followed by the words "at first sight", were redundant.

It was so agreed.

Paragraph (14), as amended, was approved.

Paragraph (15)

44. Mr. TOMUSCHAT said that paragraph (15) did not really convey the basic idea which the Commission had agreed on and which he had in fact criticized, namely that the obligations incumbent on the transit State also applied to States which had not been informed that a courier was passing through their territory. It should therefore be made clear in the commentary that the expression "transit State" also covered a State through whose territory a courier passed, but which was not informed of that fact.

45. Mr. EIRIKSSON said that he agreed with Mr. Tomuschat.

46. Mr. YANKOV (Special Rapporteur) said that, in his view, paragraph (14), which had just been approved, was sufficiently explicit in that regard. He would, however, propose that paragraph (15) be amended to read:

> "The definition is broad enough to cover the foreseen situation of a State through whose territory a courier or bag passes in transit in accordance with an established itinerary and unforeseen situations in which the provisions of paragraph 2 of article 30 will apply, with its qualifications. Except in circumstances where a visa is required, the transit State may not be aware that a courier or bag is passing through its territory. This broad concept of a transit State is based on the different situations contemplated by article 40 of the 1961 Vienna Convention on Diplomatic Relations, article 54 of the 1963 Vienna Convention on Consular Relations, article 42 of the 1969 Convention on Special Missions and article 81 of the 1975 Vienna Convention on the Representation of States."

47. Mr. CALERO RODRIGUES said that he wondered whether the Convention on Special Missions should be mentioned.

48. Mr. YANKOV (Special Rapporteur) said that, although the case of special missions was, strictly speaking, covered not by the draft articles, but by an optional protocol, a reference to it was necessary in the interests of comparative law. Moreover, such a reference would not give rise to any problem of interpretation and would not create confusion.

49. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (15) as amended by the Special Rapporteur.

It was so agreed.

Paragraph (15), as amended, was approved.

Paragraphs (16) and (17)

Paragraphs (16) and (17) were approved.

Paragraph (18)

50. Mr. TOMUSCHAT proposed that the words "It was also wondered", in the third sentence, should be replaced by "The question was also raised".

It was so agreed.

51. The CHAIRMAN proposed that the words "the fact", in the fifth sentence, should be deleted.

It was so agreed.

Paragraph (18), as amended, was approved.

Paragraph (19)

Paragraph (19) was approved.

The commentary to article 3, as amended, was approved.

Commentary to article 4 (Freedom of official communications)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

52. Mr. YANKOV (Special Rapporteur) said that the word "jurisdiction", in the second sentence, should be replaced by "territory".

Paragraph (3), as amended, was approved.

The commentary to article 4, as amended, was approved.

Commentary to article 5 (Duty to respect the laws and regulations of the receiving State and the transit State)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

53. Mr. TOMUSCHAT proposed that the word "law", in the last sentence, should be replaced by "laws".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

The commentary to article 5, as amended, was approved.

Commentary to article 6 (Non-discrimination and reciprocity)

Paragraph (1)

54. Mr. TOMUSCHAT proposed that the words "This article", at the beginning of the second sentence, should be replaced by the word "It", and that the last sentence, the meaning of which was more political than legal, should be deleted.

55. Mr. YANKOV (Special Rapporteur) said that he could accept those proposals, although it was not uncommon for commentaries to have political connotations.

Mr. Tomuschat's amendments were adopted.

Paragraph (1), as amended, was approved.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

Paragraph (4)

56. Mr. TOMUSCHAT proposed that the last sentence, which reflected an individual opinion and not the opinion of the Commission as a whole, should be deleted. Furthermore, the second sentence narrowed the application of the rule of reciprocity unduly, for it seemed to suggest that the rule would come into play only when the transit State had been subjected to restrictive treatment on the part of the sending State acting as a transit State. In his view, however, the transit State could also bring the rule of reciprocity into play with respect to the receiving State if the latter applied a particular provision with respect to it in a restrictive manner.

57. Mr. FRANCIS said that, in his view, the last sentence of paragraph (4) had a rationale. Since the object was to ensure that the diplomatic bag was not used for purposes other than those for which it was intended, it was advisable to ensure, for instance, that two States of similar intent could not enter into an agreement, written or otherwise, to pursue a practice between them that was inconsistent with the object and purpose of the articles.

58. Mr. BENNOUNA (Rapporteur) said that the last sentence was not the only one in the commentary to express an individual opinion. Moreover, it had the merit of raising the question of the limits to the application of the rule of reciprocity and non-discrimination.

59. Mr. EIRIKSSON said it was his view that, as a general rule, the Commission should refrain from interpreting articles which were based on the provisions of earlier conventions or which reproduced them word for word.

60. The second and penultimate sentences of paragraph (4) both related to the restrictive application of a provision of the present articles and he did not share Mr. Tomuschat's interpretation of the second sentence; on the contrary, he subscribed to the view expressed in it. The last sentence, which was based on the provisions of the 1969 Vienna Convention on the Law of Treaties relating to reservations, did not have a place in the commentary.

61. Given the divergence of views among members, the second and last sentences could, in his view, be deleted without difficulty.

62. Mr. McCAFFREY said he considered that the last sentence should be retained, since it concerned a slightly divergent view which had been expressed and, what was more, by more than one member.

63. He had doubts about the effect of the phrase in the second sentence reading: "It was pointed out in the Commission". Did it mean that there had been agreement on the matter? He was not sure that that was the case.

64. Mr. YANKOV (Special Rapporteur) said that the second sentence of paragraph (4) gave an interpretation, with respect to the transit State, which corresponded to the text of paragraph (2) (*a*) of article 6. The last sentence defined certain limits relating to the object and purpose of the future instrument and similar provisions were to be found in the 1969 Vienna Convention on the Law of Treaties. Paragraph (4) should therefore be retained as drafted. Moreover, it was not at all unusual for the Commission to reflect in a commentary a point of view which, although it was not that of all its members, none the less served to interpret the provision in question.

65. Mr. McCAFFREY said that he would not oppose the approval of paragraph (4), but he still wondered about the meaning of the phrase "It was pointed out in the Commission", in the second sentence. Did it refer to the opinion of the Commission or not?

66. Mr. REUTER, noting that paragraph (4) was couched in rather vague terms, said that he wished to enter a formal reservation involving a fundamental question of principle—which was, incidentally, referred to in the final articles—concerning the relationship between the present articles and other treaties, namely the question of the extent to which a multilateral convention could restrict individual agreements for an object and a purpose that in the particular case were not clearly specified. He therefore accepted the paragraph as worded, but interpreted it as an opinion expressed by several members of the Commission and not as an opinion of the Commission itself. If it were an opinion of the Commission, he would oppose it.

67. Mr. BENNOUNA (Rapporteur) said he considered that, in principle, a commentary should reflect only the opinion of the Commission as a whole.

68. Mr. TOMUSCHAT said that he would prefer the second and last sentences of paragraph (4) to be deleted. If the second sentence were retained, however, it should begin with the words "Some members of the Commission pointed out".

69. Mr. EIRIKSSON said that he favoured the deletion of the second sentence, first, because it was controversial and, secondly, because the idea it expressed was reflected in the penultimate sentence.

70. Mr. FRANCIS said that he had supported the inclusion of the last sentence because he had thought that it was the practice in the Commission for an opinion which was not that of the Commission as a whole to be reflected in the commentary. If that was not so, he would not oppose the deletion of the sentence, but, if it subsequently proved that the practice was not unknown in the Commission, he would revert to the matter.

71. Mr. CALERO RODRIGUES said that, in his view, the second and last sentences should be deleted. In principle, the commentary should not reflect opinions other than those of the Commission as a whole.

72. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the second and last sentences of paragraph (4).

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

73. Mr. BENNOUNA (Rapporteur) said that the last sentence reflected a view originally expressed by Mr. Reuter, which he had himself supported and which the Commission had endorsed. The words "It was made clear in the Commission that" should therefore be deleted and the words "was intended" should be replaced by "is intended".

It was so agreed.

Paragraph (5), as amended, was approved.

The commentary to article 6, as amended, was approved.

Commentary to article 7 (Appointment of the diplomatic courier)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

74. Mr. EIRIKSSON said that paragraph (3) could be simplified, since its main purpose was to underline the importance of the reference in article 7 to articles 9 and 12. He suggested, however, that a decision in that regard should be deferred until the following meeting to allow him time to propose a form of wording after he had discussed the matter with the Special Rapporteur.

It was so agreed.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

75. Mr. EIRIKSSON, proposing the deletion of the second sentence, said that the first part of that sentence merely repeated what was stated in article 7 and the second part implied that, if the courier did not have the nationality of at least one of the sending States, the condition set forth in article 9, paragraph 1, was not satisfied. It was, however, apparent, on reading article 9, paragraph 1, that it laid down no such condition.

76. Mr. YANKOV (Special Rapporteur), supported by Mr. CALERO RODRIGUES, said that, in his view, the second sentence of paragraph (5), which dealt with a specific situation and the consequences of that situation, should be retained. It also reflected a position which had been taken by the Commission on first reading of the draft articles and which had not changed on second reading.

77. Mr. BENNOUNA (Rapporteur) said that he, too, considered it advisable to make it clear that, in cases where there were several sending States, it was not necessary for the courier to have the nationality of each of those States and that it sufficed for him to have the nationality of at least one of them.

78. Mr. EIRIKSSON said that the Rapporteur's comments merely confirmed him in his opposition to the second sentence of paragraph (5). None of the provisions of article 9 required the courier to have the nationality of one of the sending States. If, however, the Commission preferred to retain the second sentence, he proposed that the last part should be amended to read: ". . . although the Commission considers that the courier should have the nationality of one of the sending States".

79. The CHAIRMAN said it was his understanding that the majority of the members of the Commission wished to approve paragraph (5) without change.

It was so agreed.

Paragraph (5) was approved.

The meeting rose at 1 p.m.

2144th MEETING

Wednesday, 19 July 1989, at 3 p.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its forty-first session (*continued*)

CHAPTER II. ***Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier*** (continued) (A/CN.4/L.435 and Add.1-4 and Add.4/Corr.1)

D. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/L.435/Add.1-4 and Add.4/Corr.1)

Commentary to article 7 (Appointment of the diplomatic courier) (*concluded*)

Paragraph (3) (*concluded*)

Paragraph (3) was approved.

The commentary to article 7 was approved.

Commentary to article 8 (Documentation of the diplomatic courier)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

1. Mr. EIRIKSSON said that paragraph (3) contained a lengthy explanation which seemed superfluous. He proposed that it be deleted.

2. Mr. YANKOV (Special Rapporteur) said he took the view that it was sometimes helpful to refer in a commentary to State practice, even when it was not uniform. Paragraph (3) was intended to explain exactly what kind of documentation was referred to in article 8, which was a greatly streamlined version of the text originally proposed. Paragraph (3) explained how that streamlining had come about.

3. Mr. REUTER said that paragraph (3) was useful and should not be deleted.

Paragraph (3) was approved.

The commentary to article 8 was approved.

Commentary to article 9 (Nationality of the diplomatic courier)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

4. Mr. YANKOV (Special Rapporteur) said that, following consultations with Mr. Eiriksson, he would propose the deletion of the last two sentences, which referred to article 35 of the 1963 Vienna Convention on Consular Relations. Paragraphs 1 and 2 of article 9 were indeed modelled on, but were not identical to, the corresponding provisions of the 1963 Vienna Convention. In particular, the words "in principle" did not appear in that Convention.

The Special Rapporteur's amendment was adopted.

Paragraph (2), as amended, was approved.

Paragraphs (3) and (4)

5. Mr. YANKOV (Special Rapporteur) said that paragraph (3) should be shortened. The first sentence should remain unchanged, and the second should simply read: "This is due to the fact that the principle in question may be subject to exceptions." The phrase "to be determined by agreement between the sending State and the receiving State" should be deleted. The words "as arises from paragraph 2 of article 9, the consent of the receiving State is required for the appointment of one of its nationals as a diplomatic courier of the sending State" should, with suitable drafting adjustments, become the first sentence of paragraph (4). The first sentence of the original paragraph (4) should remain unchanged, but the next sentence should be amended to read: "The words 'at any time' are not intended to legitimize any arbitrary withdrawal of consent, or the interruption or interference with the performance of a mission already begun." The third sentence, beginning "A withdrawal of that nature . . .", should be deleted, as should the fifth sentence, beginning "The withdrawal should only proceed in serious circumstances . . .". Some drafting changes would also be made to the last sentence, eliminating in particular the unnecessary words "the Commission felt it was necessary".

Paragraphs (3) and (4), as amended, were approved.

Paragraph (5)

6. Mr. EIRIKSSON pointed out that the words in brackets at the end of the first sentence, "(this category appears in paragraph 5 of article 35 of the 1963 Vienna Convention on Consular Relations)", were misleading, for they suggested that article 35 of the 1963 Vienna Convention was the source of the provision in paragraph 3 (*a*) of article 9. In actual fact, that subparagraph contained a rule which was practically the opposite of the one set out in article 35 of the 1963 Vienna Convention. The words "although it is treated differently" should therefore be added to the bracketed passage.

7. Mr. McCAFFREY proposed, as a simple solution, that the passage in question should be deleted.

8. The CHAIRMAN, speaking as a member of the Commission, pointed out that the passage simply indicated that the category referred to in paragraph 3 (*a*) of article 9 was not new, since it already existed under article 35 of the 1963 Vienna Convention. Nothing was said about the rule applicable to that category.

9. Mr. AL-QAYSI drew attention to the similar passage in brackets which appeared in support of category (*a*) and which read: "(this category is already contained in the respective articles of the four codification conventions mentioned above)".

10. Mr. REUTER suggested that, to take that point into account, the two bracketed passages should be treated differently. The one relating to category (*b*) would be deleted, as suggested; the one relating to category (*a*) would be incorporated in the main sentence without brackets and with suitable drafting changes.

11. Mr. TOMUSCHAT pointed out that article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations did not contain any reference to the nationality of the courier. Hence it was not correct to say that category (*a*) was already contained in the respective articles of the four codification conventions.

12. The CHAIRMAN suggested that both of the passages in brackets could be deleted without loss of substance.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

13. Mr. EIRIKSSON proposed that the phrase "As explained in paragraph (5) of the commentary to article 7" should be deleted.

14. Mr. YANKOV (Special Rapporteur) recalled that, during the consideration of the commentary to article 7, Mr. Eiriksson had proposed the deletion of the second sentence of paragraph (5) of that commentary (2143rd meeting, para. 75), a proposal that had not been accepted. If any issue of substance was now involved, it had already been settled in connection with article 7.

15. The CHAIRMAN pointed out that the opening phrase of paragraph (6) constituted simply an aid to the reader, to show the connection between the two paragraphs in question.

Paragraph (6) was approved.

The commentary to article 9, as amended, was approved.

Commentary to article 10 (Functions of the diplomatic courier)

Paragraph (1)

16. Mr. EIRIKSSON proposed that the final words, "as provisionally adopted", should be deleted.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

17. Mr. EIRIKSSON said that the last sentence should be amended to bring out the meaning better.

18. Mr. KOTLIAR (Secretary to the Commission) suggested that the word "since" should be inserted after the words "arbitrary manner," and that the word "providing" should be replaced by "provides".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

19. Mr. EIRIKSSON suggested that the phrase "indicated in the official document and on the bag itself", in the second sentence, should be deleted, since it was superfluous: there was no need to explain who the consignee was.

20. Mr. YANKOV (Special Rapporteur) said that the phrase in question was useful and accurate and should be retained.

Paragraph (3) was approved.

Paragraph (4)

21. Mr. EIRIKSSON said that paragraph (4) reproduced a great deal of material from the commentaries to other articles and should be greatly shortened.

22. Mr. REUTER said that paragraph (4) was of great use to readers, like himself, who were unfamiliar with the topic and needed all the information they could obtain.

Paragraph (4) was approved.

Paragraph (5)

23. Mr. McCAFFREY said that the phrase "It was made clear in the Commission that" was rather vague and should be made more specific. Moreover, the following additional text should be inserted at the end of the paragraph: "or is leaving a receiving State after having delivered a bag without taking custody of another one". That text would show that, even when a courier had to leave a country without being in possession of a diplomatic bag, he was still engaged in the performance of his functions.

24. Mr. YANKOV (Special Rapporteur) said that both points raised by Mr. McCaffrey were well taken. The general feeling in the Drafting Committee had been that the courier was performing his functions even when he was not in possession of a bag, but was going to pick one up, for example. He therefore endorsed the insertion of the additional text proposed by Mr. McCaffrey and would suggest that the phrase he had rightly qualified as vague should be deleted.

It was so agreed.

Paragraph (5), as amended, was approved.

The commentary to article 10, as amended, was approved.

Commentary to article 11 (End of the functions of the diplomatic courier)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

25. Mr. RAZAFINDRALAMBO said that, in the light of the amendment made to paragraph (5) of the commentary to article 10, an addition should be made in paragraph (3) to indicate that the courier's functions did not come to an end once he had handed over the diplomatic bag.

26. Mr. McCAFFREY said that paragraph (3) was not inconsistent with paragraph (5) of the commentary to article 10, but, if the Commission so wished, it might add the phrase "by completion of his itinerary" at the end of the second sentence.

It was so agreed.

27. Mr. TOMUSCHAT suggested that the phrase "It was noted in the Commission that", at the beginning of the fourth sentence, should be deleted.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

28. Mr. EIRIKSSON said that paragraph (5) tended to confuse the functions of article 11 (*c*) and article 12. He would suggest that the word "declaration", in the third sentence, be replaced by "notification", which was the more accurate term. In addition, the last sentence should be replaced by the following text: "If the sending State does not recall the courier or terminate his functions, the receiving State may refuse to recognize him as a courier with effect from the time of notification to the sending State."

It was so agreed.

29. Mr. McCAFFREY proposed that the word "Furthermore", at the beginning of the first sentence, should be deleted.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

30. Mr. EIRIKSSON said that the phrase "such as physical phenomena, the most conspicuous of which would be the courier's death", in the second sentence, should be replaced by "such as his death".

It was so agreed.

Paragraph (6), as amended, was approved.

The commentary to article 11, as amended, was approved.

Commentary to article 12 (The diplomatic courier declared *persona non grata* or not acceptable)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

31. Mr. EIRIKSSON said that it was entirely unnecessary to draw a distinction between a diplomatic courier and a head of mission, as the differences between them were self-evident. He would therefore propose that the third sentence be deleted; that the word "he", in the fourth sentence, be replaced by "the courier"; and that, in the fifth sentence, the phrases "as in the case of a head of mission who has not been approved" and "with the same effect as in the case of the head of mission" be deleted.

32. Mr. BENNOUNA (Rapporteur) said that, as the institution of *agrément* existed for a head of mission but was not applicable to the diplomatic courier, the distinction

drawn between the two was quite useful, and the third sentence of paragraph (2) should not be deleted. He saw no pressing need to reduce the length of the commentaries in general: after all, they related to articles that had been adopted on second reading, and they were therefore particularly important. He was not in favour of any of the amendments proposed by Mr. Eiriksson and believed it was not appropriate now to try to rewrite the report. The Commission was fully agreed on the substance and that was the most important thing.

33. Mr. EIRIKSSON said that his proposals were not merely matters of style but were matters of substance. The Commission's working methods militated against the necessary careful consideration of its draft report in the time available before the end of the session.

34. Mr. YANKOV (Special Rapporteur) said that he would not oppose the deletion of the phrases referred to by Mr. Eiriksson, because they did amount to a statement of the obvious. His intention in paragraph (2) had been to respond to criticisms of his own tendency to place couriers and diplomats on an equal footing: he had wished to emphasize the differences between them.

35. Mr. REUTER said that paragraph (2) gave a useful explanation of matters that were not necessarily self-evident and he would not agree to the proposed deletions.

Paragraph (2) was approved.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were approved.

Paragraph (6)

36. Mr. EIRIKSSON said that he intended to make some comments in connection with the commentary to article 21 which would have a bearing on paragraph (6) of the commentary to article 12.

37. The CHAIRMAN suggested that paragraph (6) should be approved on the understanding that the Commission would revert to it, if necessary, in connection with its consideration of the commentary to article 21.

It was so agreed.

Paragraph (6) was approved.

The commentary to article 12 was approved.

Commentary to article 13 (Facilities accorded to the diplomatic courier)

Paragraph (1)

38. Mr. McCAFFREY said that, in his opinion, freedom of communication did not cover communications between the courier and the sending State. Accordingly, the words "the exercise of the freedom of communication", at the end of paragraph (1), should be replaced by "the establishment of any contacts with the sending State and its missions".

It was so agreed.

39. Mr. YANKOV (Special Rapporteur) said that, in order to avoid any misunderstanding and in view of the history of rules pertaining to facilities accorded to the courier in the exercise of his functions, the phrase "in the exercise of his functions relating to the freedom of communication" should be inserted after the word "courier".

Paragraph (1), as amended, was approved.

Paragraph (2)

40. Following a suggestion by Mr. EIRIKSSON, Mr. YANKOV (Special Rapporteur) proposed that the two sentences should be combined and be amended to read: "Paragraph 1 is of a general character and is inspired by article 25 of the . . .".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

41. Mr. McCAFFREY suggested that the word "conceived", in the third sentence, should be replaced by "anticipated".

It was so agreed.

42. Mr. EIRIKSSON pointed out that the last subparagraph should not be indented but should form part of the body of the text, and proposed that the last sentence of that subparagraph should be deleted.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

43. Mr. BENNOUNA (Rapporteur), supported by Mr. CALERO RODRIGUES, proposed that the fifth sentence should end with the words "secure place", the remainder of the sentence being deleted.

It was so agreed.

44. Mr. TOMUSCHAT proposed that the words "within reasonable terms", in the seventh sentence, should be replaced by "within reasonable limits".

It was so agreed.

45. Mr. BENNOUNA (Rapporteur) remarked that the second part of the eighth sentence, reading "the internal organization of other States placed the State on an equal footing with private persons in that connection", was not felicitous.

46. After a discussion in which Mr. YANKOV (Special Rapporteur), Mr. McCAFFREY and Mr. AL-QAYSI took part, Mr. MAHIOU suggested that the words in question should be replaced by "this was not necessarily so in other States".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

47. Following a comment by Mr. McCAFFREY, Mr. AL-QAYSI proposed that the words "This might be the case when", at the beginning of the third sentence, should be deleted.

It was so agreed.

Paragraph (6), as amended, was approved.

The commentary to article 13, as amended, was approved.

Commentary to article 14 (Entry into the territory of the receiving State or the transit State)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

48. Mr. EIRIKSSON, pointing out that the third sentence was essentially a repetition of the first sentence, proposed that it should be deleted.

It was so agreed.

49. The last sentence was tautological and the words "as meaning 'in the course of the performance of his functions' which includes" should be replaced by "to include".

50. After a discussion in which Mr. BEESLEY and Mr. YANKOV (Special Rapporteur) took part, the CHAIRMAN, noting the absence of support for Mr. Eiriksson's second proposal, suggested that the last sentence of paragraph (2) should remain unchanged.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 14, as amended, was approved.

Commentary to article 15 (Freedom of movement)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

51. Mr. McCAFFREY proposed that the words "of the courier in the performance of his functions" should be inserted after the words "free movement and travel", in the third sentence. The courier enjoyed the right of free movement and travel for the purpose of his official duties. It would be wrong to imply that he enjoyed complete freedom of movement for all purposes.

52. Mr. YANKOV (Special Rapporteur) said that the proposed amendment was an improvement. At the same time, he drew attention to the last sentence of paragraph (3), which made it clear that, outside the performance of his functions, the courier enjoyed "the normal freedoms accorded to foreign visitors by the laws and regulations of the receiving or transit State". There was no suggestion of any absolute freedom of movement for the courier.

53. Mr. EIRIKSSON said that the last sentence of paragraph (2) seemed to suggest, with regard to the courier's travel arrangements, greater facilities than those specified in article 13. He drew attention in that regard to paragraph (3) of the commentary.

54. Mr. YANKOV (Special Rapporteur) said that, in the Drafting Committee, both on first reading and on second reading, it had been agreed that all travel arrangements had to be made by the courier himself and not by the receiving or transit State.

55. Mr. McCAFFREY said that he had some sympathy for the point raised by Mr. Eiriksson but could accept the last sentence of paragraph (2) because the possibility of assistance by the authorities of the receiving or transit State was qualified by the words "in exceptional circumstances", apart from the condition relating to "insurmountable obstacles" and the limitation "to the extent practicable".

56. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (2) with the amendment proposed by Mr. McCaffrey (para. 51 above).

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

57. Mr. McCAFFREY said that the words "to have access to", in the first sentence, were unnecessary and should be deleted, as should the phrase "it was explained in the Commission that", in the penultimate sentence.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

The commentary to article 15, as amended, was approved.

Commentary to article 16 (Personal protection and inviolability)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

58. Mr. EIRIKSSON noted that the first part of the first sentence made a comparison between the provisions of article 16 and those of the corresponding article of the 1961 Vienna Convention on Diplomatic Relations. The statement in the second part of the sentence, beginning with the words "due primarily to the courier's function . . .", did not, however, follow on from that comparison.

59. Mr. YANKOV (Special Rapporteur) explained that it was precisely because of the courier's official functions and the confidentiality of official correspondence that the provisions on personal protection and inviolability had been included in the draft.

60. Mr. REUTER suggested that the second part of the first sentence of paragraph (2) should become a separate sentence and be amended along the following lines: "This is justified by the nature of the courier's function, which is a natural extension of the diplomatic function . . .".

61. Mr. EIRIKSSON said that he found the formula "natural extension" in that amendment somewhat awkward. He proposed that the new sentence should begin simply: "This is justified by the nature of the courier's function . . .".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3) and (4)

62. Mr. MAHIOU pointed out that the first sentence of paragraph (3) referred to the "twofold nature" of the inviolability of the courier, but the paragraph dealt with only one aspect. The "other aspect of the twofold nature" was the subject-matter of paragraph (4). Consequently, the two paragraphs should be combined.

It was so agreed.

Paragraphs (3) and (4), as amended, were approved.

Paragraph (5) (new paragraph (4))

Paragraph (5) (new paragraph (4)) was approved.

The commentary to article 16, as amended, was approved.

Commentary to article 17 (Inviolability of temporary accommodation)

Paragraph (1)

63. Mr. OGISO proposed that, in order to reflect the extensive discussion which had taken place on the subject, the following new sentence should be added after the

first sentence: "During the consideration of this question, the point was raised as to whether the lack of provision for the inviolability of a courier's temporary accommodation in the codification conventions should be interpreted as denying the existence of such a customary rule." Moreover, the beginning of the second sentence of paragraph (1) as drafted should be expanded to state: "However, that view was not accepted by the Commission on the grounds that there exist . . .".

64. Mr. AL-QAYSI said that, in his view, Mr. Ogiso's point was implicit in the first sentence of paragraph (1).

65. Mr. McCAFFREY said he considered that some reference along the lines proposed by Mr. Ogiso should be included in the commentary.

66. Mr. BENNOUNA (Rapporteur) said that the point was already covered in the last sentence of paragraph (2), which expressly stated that the question arose whether special rules on the inviolability of the temporary accommodation of the diplomatic courier should apply.

Paragraph (1) was approved.

Paragraph (2)

67. Mr. CALERO RODRIGUES proposed that the opening words of paragraph (2), "Normally, couriers are housed", should be replaced by "Couriers are often housed".

It was so agreed.

68. After a discussion in which Mr. EIRIKSSON, Mr. McCAFFREY, Mr. Sreenivasa RAO and Mr. YANKOV (Special Rapporteur) took part, the CHAIRMAN suggested that the words "then the question arises whether" and the word "should", in the last sentence, should be deleted.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

69. Mr. EIRIKSSON said that the last part of paragraph (4) reflected a view on inviolability with which he could not agree. In his opinion, a State's obligation to protect a courier in temporary accommodation was no greater than its obligation with respect to ordinary citizens.

70. Mr. TOMUSCHAT, agreeing with Mr. Eiriksson, said that the statement in the seventh sentence that protective measures were "common in hotels" was simply not correct. He therefore proposed that the last three sentences of paragraph (4) should be deleted.

71. Mr. YANKOV (Special Rapporteur) said that, while he would not object to the deletion of the seventh and eighth sentences, the last sentence of the paragraph was highly relevant and should be retained.

72. The CHAIRMAN suggested that the seventh and eighth sentences of paragraph (4) should be deleted and that, in the last sentence, the word "However" should be replaced by "Moreover" and the word "justify" by "warrant".

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were approved.

Paragraph (9)

73. Mr. BENNOUNA (Rapporteur) said that the words "Paragraph 4 reflects the Commission's view that", in the first sentence, should be deleted.

74. Mr. YANKOV (Special Rapporteur), agreeing with that change, said that, in the first sentence of the French text, the word *devait* should be replaced by *doit*.

75. Mr. EIRIKSSON proposed that the words "and owing to factual impossibilities", in the last sentence, should be deleted.

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

76. Mr. TOMUSCHAT said that, in his view, paragraph (10) was superfluous and should be deleted.

77. Mr. EIRIKSSON and Mr. McCAFFREY supported that proposal.

78. Mr. BENNOUNA (Rapporteur) said he considered that the last two sentences of paragraph (10) were useful.

The meeting rose at 6.20 p.m.

2145th MEETING

Thursday, 20 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its forty-first session (*continued*)

CHAPTER II. ***Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier*** (continued) (A/CN.4/L.435 and Add.1-4 and Add.4/Corr.1)

D. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/L.435/Add.1-4 and Add.4/Corr.1)

Commentary to article 17 (Inviolability of temporary accommodation) (*concluded*)

Paragraph (10) (*concluded*)

1. Mr. YANKOV (Special Rapporteur) said that paragraph (10) was the result of a compromise: in exchange for the deletion of a draft article relating specifically to the inviolability of the means of transport of a courier accompanying a bag, the Commission had decided to include paragraph (10) in the commentary.

2. Mr. MAHIOU said that he endorsed the comment made by the Special Rapporteur, but nevertheless proposed that the first three sentences of paragraph (10) should be deleted.

It was so agreed.

Paragraph (10), as amended, was approved.

The commentary to article 17, as amended, was approved.

Commentary to article 18 (Immunity from jurisdiction)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraphs (3) to (5)

3. Mr. YANKOV (Special Rapporteur) proposed that the following new paragraph (3) *bis* should be added: "Views in the Commission were divided on the need for a special provision on immunity from criminal jurisdiction and the scope of such immunity." The second and third sentences of paragraph (4) would be deleted and the first sentence would be amended to read: "On the one hand, reservations were expressed concerning paragraph 1 on the ground that article 16, on the inviolability of the diplomatic courier, already provided the courier with all the protection he needed to perform his functions." The beginning of paragraph (5) would be amended to read: "On the other hand, reservations were expressed as to the addition of the words 'in respect of acts performed in the exercise of his functions', on the ground that the granting of immunity . . .".

4. Mr. CALERO RODRIGUES said that the beginning of the proposed paragraph (3) *bis* would only repeat what was stated in paragraph (2).

5. Mr. BENNOUNA (Rapporteur), recalling that the Commission had decided not to include any opinions other than its own in the commentaries, said that it should abide by that decision. Moreover, as Mr. Calero Rodrigues had pointed out, the proposed paragraph (3) *bis* would only repeat what was stated in paragraph (2). Paragraph (4) might not be unnecessary, but it could be included at the end of paragraph (2). Paragraph (5) was, however, of an entirely different nature, since it referred to the reservations expressed with regard to the Commission's decision and therefore did not belong in the commentary.

6. Mr. CALERO RODRIGUES said that the amendments proposed by the Special Rapporteur took account in a balanced way of the two trends of opinion in the Commission. In order to make the repetition less glaring, the proposed paragraph (3) *bis* could begin with the words "As indicated in paragraph (2) above".

7. Mr. McCAFFREY said that he supported the position of the Special Rapporteur and Mr. Calero Rodrigues.

8. Mr. BENNOUNA (Rapporteur) proposed that the commentary should be reorganized as follows: the texts of paragraphs (4) and (5), as amended by the Special Rapporteur, would come after the first sentence of paragraph (2), and the second sentence of paragraph (2) would become a new paragraph (2) *bis*.

9. Mr. YANKOV (Special Rapporteur) proposed that the text he had suggested for a new paragraph (3) *bis* (para. 3 above), as amended by Mr. Calero Rodrigues (para. 6 above), should become paragraph (3) of the commentary. The present paragraphs (4) and (5), as amended by him, would be combined to constitute paragraph (4). The present paragraph (3) would become paragraph (5).

10. Mr. MAHIOU said that he agreed with the solution proposed by the Special Rapporteur, which was consistent with the logic of the argument.

11. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraphs (3) to (5) as amended by the Special Rapporteur (para. 9 above).

It was so agreed.

Paragraphs (3) to (5), as amended, were approved.

Paragraph (6)

12. Mr. YANKOV (Special Rapporteur) said that the beginning of the first sentence should be amended to read: "The first sentence of paragraph 2 is modelled on the second sentence of . . .".

13. Mr. TOMUSCHAT proposed that a reference to article 43 of the 1963 Vienna Convention, a basic provision in the matter, should be added by inserting the words "article 43 of the 1963 Vienna Convention on Consular Relations and" after the word "like" in the third sentence.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

14. Mr. McCAFFREY said that paragraph (7) was too long. He therefore proposed that it should be divided into two, the new paragraph beginning at the eleventh sentence with the words "As regards the interpretation . . .".

It was so agreed.

15. Mr. EIRIKSSON said he found it disturbing that a courier could justify "irregular driving" by invoking the requirements of his functions. He therefore proposed that, in the thirteenth sentence of the original paragraph (7), the words "or irregular driving" should be deleted.

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraphs (8) and (9) (new paragraphs (9) and (10))

Paragraphs (8) and (9) (new paragraphs (9) and (10)) were approved.

Paragraph (10) (new paragraph (11))

16. Mr. McCAFFREY said that he did not see any need for the French word *renvoyait* in the last sentence of the English text. That word was used in private international law in Anglo-Saxon countries, but it had a very specific meaning, which was not quite the one it had in the text under consideration. He therefore proposed that it be deleted.

It was so agreed.

Paragraph (10) (new paragraph (11)), as amended, was approved.

Paragraphs (11) to (13) (new paragraphs (12) to (14))

Paragraphs (11) to (13) (new paragraphs (12) to (14)) were approved.

Paragraph (14) (new paragraph (15))

17. Mr. TOMUSCHAT proposed that the words "were particularly stressed in the Commission", in the second sentence, should be replaced by "deserve particular attention"; that the words "as had been expressed in the case of paragraphs 1 and 2", in the third sentence, should be replaced by "as those applying under paragraphs 1 and 2";

and that the words "it was said that", in the fourth sentence, should be deleted.

It was so agreed.

Paragraph (14) (new paragraph (15)), as amended, was approved.

Paragraphs (15) to (18) (new paragraphs (16) to (19))

Paragraphs (15) to (18) (new paragraphs (16) to (19)) were approved.

The commentary to article 18, as amended, was approved.

Commentary to article 19 (Exemption from customs duties, dues and taxes)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

18. Mr. McCAFFREY proposed that, in order not to give the impression that the chronological order of imports made any difference, the words "later imports", at the end of the first sentence, should be replaced by "other imports".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

Paragraph (6)

19. Mr. McCAFFREY proposed that, in the second sentence, the word "aspects" should be replaced by "respects" and the words "the courier's level" by "the courier's status".

It was so agreed.

20. Mr. EIRIKSSON proposed that the word "therefore", in the same sentence, should be deleted.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

21. Mr. MAHIOU pointed out there was a mistake in the paragraph numbering in the French text.

22. Mr. TOMUSCHAT asked what airport taxes were meant in the last sentence. In some countries, such taxes were regarded as payment for services rendered.

23. After a brief discussion in which Mr. PAWLAK, the CHAIRMAN, Mr. EIRIKSSON, Mr. YANKOV (Special Rapporteur) and Mr. MAHIOU took part, the CHAIRMAN proposed that the words "such as hotel and airport taxes", in the last sentence, should be deleted.

It was so agreed.

24. Mr. CALERO RODRIGUES proposed that the words "It was also stated in the Commission that", at the beginning of the last sentence, should be deleted.

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraph (8)

Paragraph (8) was approved.

Paragraph (9)

25. Mr. McCAFFREY proposed that the words "it discarded the possibility", in the second sentence, should be replaced by "the possibility was extremely remote".

It was so agreed.

Paragraph (9), as amended, was approved.

The commentary to article 19, as amended, was approved.

Commentary to article 20 (Exemption from examination and inspection)

Paragraph (1)

26. Mr. EIRIKSSON proposed that the Commission should follow the usual practice and refer in the first sentence to the "codification conventions", rather than to the "four codification conventions on diplomatic or consular law".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

27. Mr. YANKOV (Special Rapporteur) said that the words "It was understood in the Commission that", at the beginning of the first sentence, should be deleted.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

28. Mr. McCAFFREY proposed that the word "guarantee", in the second sentence, should be replaced by "safeguard".

It was so agreed.

29. Mr. EIRIKSSON said that the courier's baggage could contain articles imported unlawfully other than "for lucrative purposes", as stated in the first sentence.

30. Mr. BEESLEY proposed that that phrase should be amended to read: "for lucrative or other improper purposes".

It was so agreed.

Paragraph (4), as amended, was approved.

The commentary to article 20, as amended, was approved.

Commentary to article 21 (Beginning and end of privileges and immunities)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

31. Mr. YANKOV (Special Rapporteur) said that the words "for example" should be inserted before the words "in the case of a multiple-mission courier", in the fifth sentence.

Paragraph (4), as amended, was approved.

Paragraph (5)

32. Mr. YANKOV (Special Rapporteur) said that the beginning of the second sentence should be amended to read: "This would be the case, for instance, of a receiving State which did not want to have recourse to a *persona non grata* declaration and yet wished to curtail possible abuses . . . ".

Paragraph (5), as amended, was approved.

Paragraph (6)

33. Mr. YANKOV (Special Rapporteur), replying to a comment by Mr. McCaffrey, proposed that the second sentence and the beginning of the third should be deleted. The new second sentence would thus begin: "The solution adopted follows article 27, paragraph 6 . . .".

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

Paragraph (7) was approved.

Paragraph (8)

34. Mr. McCAFFREY proposed that the words "sovereign decision", in the last sentence, should be replaced by "sovereign function".

It was so agreed.

Paragraph (8), as amended, was approved.

The commentary to article 21, as amended, was approved.

Commentary to article 22 (Waiver of immunities)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

35. Mr. TOMUSCHAT proposed that the words "and with the dignity befitting such duties", at the end of the paragraph, should be deleted.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were approved.

Paragraphs (7) and (8)

36. Mr. McCAFFREY said he thought that the commentary relating to paragraph 3 of article 22 was important enough to have its own subheading. He therefore proposed that paragraph (7) should be preceded by the subheading "Paragraph 2" and paragraph (8) by the subheading "Paragraph 3". He also proposed that the words "on the understanding that", in the last sentence of paragraph (7), should be replaced by "on the ground that, as explained below".

It was so agreed.

Paragraphs (7) and (8), as amended, were approved.

Paragraph (9)

37. Mr. YANKOV (Special Rapporteur), replying to a comment by Mr. McCaffrey, proposed that the beginning of the fourth sentence should be amended to read: "Although some members of the Commission questioned the advisability of this rule, the Commission was of the view that ...".

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

38. Mr. McCAFFREY proposed that the words "is broad enough to cover", in the second sentence, should be replaced by "is intended to cover".

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraph (11)

Paragraph (11) was approved.

Paragraph (12)

39. Mr. McCAFFREY proposed that the words "through negotiation and equity", at the end of the paragraph, should be replaced by "through negotiation of an equitable resolution".

It was so agreed.

Paragraph (12), as amended, was approved.

Paragraph (13)

40. Mr. YANKOV (Special Rapporteur) said that the words "It was made clear in the Commission that" should be deleted.

Paragraph (13), as amended, was approved.

Paragraph (14)

41. Mr. YANKOV (Special Rapporteur) said that the words "It was also pointed out in the Commission that", at the beginning of the paragraph, should be deleted.

Paragraph (14), as amended, was approved.

Paragraph (15)

Paragraph (15) was approved.

The commentary to article 22, as amended, was approved.

Commentary to article 23 (Status of the captain of a ship or aircraft entrusted with the diplomatic bag)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

42. Mr. TOMUSCHAT said that he had some doubts about the relationship between the commentary and the rule stated. Did the words "which is scheduled to arrive at an authorized port of entry", in paragraph 1 of article 23, necessarily refer to a regular flight? If they did, the text would give the impression that greater importance was being attached to regular flights, whereas it should stress the fact that the port of entry had to be authorized.

43. Mr. BENNOUNA (Rapporteur) said he thought that the word "denote", in the first sentence of paragraph (4), should be replaced by another term and that that sentence should end with the words "the port of entry concerned". The remainder of the sentence would form a separate sentence, beginning: "It does not refer to voyages or flights ...".

44. Mr. McCAFFREY proposed that the words "has been included in the paragraph to denote ships or aircraft", in the first sentence of paragraph (4), should be replaced by "refers to ships or aircraft".

45. Mr. EIRIKSSON said that, in his view, the only possible interpretation of the word "scheduled" was that the ship or aircraft was intended to arrive at an authorized port of entry. He also pointed out that there was no mention of "commercial service" in the 1961 Vienna Convention on Diplomatic Relations or the 1963 Vienna Convention on Consular Relations, which referred only to "commercial aircraft".

Mr. McCaffrey's amendment was adopted.

Paragraph (4), as amended, was approved.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved.

Paragraph (7)

46. Mr. RAZAFINDRALAMBO proposed that the words "It was pointed out in the Commission that", at the beginning of the last sentence, should be deleted.

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraph (8)

47. Mr. BENNOUNA (Rapporteur) said that the words "It was stressed in the Commission that", at the beginning of the second sentence, should be deleted.

Paragraph (8), as amended, was approved.

Paragraph (9)

48. Mr. RAZAFINDRALAMBO proposed that the first two sentences should be combined and be amended to read: "The Commission decided that the obligation for the receiving State laid down in paragraph 3 should not be qualified ... of the present commentary, so as not to create the impression ... for the receiving State."

49. Mr. YANKOV (Special Rapporteur), supported by Mr. CALERO RODRIGUES and Mr. TOMUSCHAT, suggested that the text should be retained as it stood.

It was so agreed.

Paragraph (9) was approved.

Paragraph (10)

50. Mr. NJENGA said that it was open to question whether, in State practice, the procedure to be followed by the member of the mission, consular post or delegation who was to take possession of the bag was as rigid as that described in the second sentence of paragraph (10). He was not sure that the person who had an authorization would always be the only one to be able to take possession of the bag. In many cases, for example when the authorized person was absent, another member of the mission, consular post or delegation who was duly authorized by the ambassador, or the ambassador himself, could take possession of the bag without having to present any special permit. He therefore proposed that the second sentence be deleted.

51. Mr. YANKOV (Special Rapporteur) said that the rule referred to by Mr. Njenga was not absolute and that, in most cases, the person who was to take possession of the bag had to present a special attestation certifying that he was authorized to do so. Some States issued authorizations which were valid for several months, for several persons. The excessive rigidity to which Mr. Njenga had referred could be dealt with by adding the words "in most instances" after the words "would not suffice" in the second sentence.

52. Mr. BENNOUNA (Rapporteur) said that the name of the person appointed to take possession of the bag was usually communicated to the authorities of the host country. The person concerned then did not have to present a special authorization every time. If he was succeeded by another person, the change was notified to the authorities. In his own view, the last two sentences of paragraph (10) could be deleted, since the first sentence contained the words "must be duly authorized".

53. Mr. CALERO RODRIGUES said that it would be better all the same to retain the last sentence.

54. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the second sentence of paragraph (10).

It was so agreed.

Paragraph (10), as amended, was approved.

The commentary to article 23, as amended, was approved.

Commentary to article 24 (Identification of the diplomatic bag)

Paragraph (1)

55. Mr. TOMUSCHAT said that he preferred the formula "Paragraph ... of article ... is modelled on", as used in the paragraph under consideration, to the formula "The sources for article ... are ...", as used elsewhere in the commentaries. He proposed that the latter wording should be replaced by the former throughout the text.

56. The CHAIRMAN suggested that the Special Rapporteur should be allowed to decide on the advisability of such a change when he reviewed all the amendments the Commission had made to the draft report, including the deletion of expressions such as "It was stressed in the Commission that", "It was explained that" and "It was clearly indicated that".

It was so agreed.

Paragraph (1) was approved.

Paragraph (2)

57. Mr. OGISO said that the formula used in article 24, namely "the packages constituting the diplomatic bag", should be used instead of the words "a diplomatic bag", in the second sentence.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3) to (6)

Paragraphs (3) to (6) were approved.

Paragraph (7)

58. Mr. McCAFFREY said that the words "some members of the Commission thought that", "others members thought that" and "The Commission as a whole", in the second and third sentences, should be retained. He proposed, however, that the words "did not deem it advisable to lay it down in mandatory language in the text of the paragraph", at the end of the paragraph, should be replaced by "did not deem it advisable to include such a requirement in the text of paragraph 2".

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraph (8)

Paragraph (8) was approved.

The commentary to article 24, as amended, was approved.

Commentary to article 25 (Contents of the diplomatic bag)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

The commentary to article 25 was approved.

Commentary to article 26 (Transmission of the diplomatic bag by postal service or any mode of transport)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were approved.

The commentary to article 26 was approved.

Commentary to article 27 (Safe and rapid dispatch of the diplomatic bag)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were approved.

The commentary to article 27 was approved.

Commentary to article 28 (Protection of the diplomatic bag)

Paragraph (1)

59. Mr. YANKOV (Special Rapporteur) said that the word "corner-stone" should be replaced by the words "key provision".

Paragraph (1), as amended, was approved.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were approved.

Paragraph (6)

60. Mr. OGISO said that he found the last sentence, particularly the words "either electronic or technical", unclear.

61. Mr. YANKOV (Special Rapporteur) said that an external examination which was intended to identify the diplomatic bag would not be regarded as affecting its inviolability. Moreover, if it was suspected that the bag contained drugs, only the use of police dogs would be authorized, to the exclusion of any other means of examination. He suggested that the words "either electronic or technical" should be deleted, although they had been used in his eighth report (A/CN.4/417) and had not given rise to any reaction on the part of members of the Commission.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraphs (7) to (11)

Paragraphs (7) to (11) were approved.

The commentary to article 28, as amended, was approved.

Commentary to article 29 (Exemption from customs duties and taxes)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

The commentary to article 29 was approved.

Commentary to article 30 (Protective measures in case of *force majeure* or other exceptional circumstances)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were approved.

Paragraph (8)

62. After an exchange of views in which Mr. EIRIKSSON and Mr. CALERO RODRIGUES took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (8), on the understanding that the Special Rapporteur would add a passage explaining that the obligations of the transit State laid down in article 30 applied only if that State was aware of the presence of the courier or the bag in its territory.

It was so agreed.

Paragraph (8), as amended, was approved.

The commentary to article 30, as amended, was approved.

Commentary to article 31 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

63. Mr. YANKOV (Special Rapporteur) said that the words "The Commission was unanimously of the view that", in the first sentence, should be deleted.

Paragraph (4), as amended, was approved.

The commentary to article 31, as amended, was approved.

Commentary to article 32 (Relationship between the present articles and other conventions and agreements)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

64. Mr. YANKOV (Special Rapporteur) said that the words "in the view of some members of the Commission", in the penultimate sentence, should be deleted.

Paragraph (2), as amended, was approved.

Paragraph (3)

65. Mr. McCAFFREY proposed that the words "purport to indicate" should be replaced by the word "indicate".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were approved.

Paragraph 7

66. Mr. YANKOV (Special Rapporteur) said that the end of the second sentence should read: ". . . intended to safeguard the basic rules contained in the present articles". The words "It was noted in the Commission that", at the beginning of the fourth sentence, should be deleted.

67. Mr. TOMUSCHAT proposed that the last sentence should be amended to read: "The same would be true of an agreement whereby two States stipulated that their bags were to be subject to means of electronic or mechanical examination."

68. Mr. BARSEGOV said that he doubted very much whether the last sentence was necessary, since it was for States to decide on the content of the agreements they concluded and it was not for the Commission to tell them what that content should be.

69. Mr. NJENGA said that he, too, was in favour of the deletion of the last sentence, which related to an issue that had been the subject of a long and inconclusive debate in the Commission.

70. Mr. OGISO pointed out that the last sentence reflected an opinion which had actually been expressed.

71. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (7) as amended by the Special Rapporteur and Mr. Tomuschat.

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraph (8)

Paragraph (8) was approved.

Paragraph (9)

72. Mr. YANKOV (Special Rapporteur) proposed that paragraph (9) should be amended to read: "The draft could also deal with the legal relationship between the present articles and customary rules on the same subject."

73. After an exchange of views in which Mr. PAWLAK, Mr. EIRIKSSON, Mr. CALERO RODRIGUES, Mr. McCAFFREY, the CHAIRMAN, speaking as a member of the Commission, Mr. TOMUSCHAT, Mr. BEESLEY, Mr. BENNOUNA

(Rapporteur), Mr. FRANCIS and Mr. YANKOV (Special Rapporteur) took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete paragraph (9), which it regarded as being unnecessary in the commentary, since it would be indicated in the introduction to chapter II of the report that the Commission had not discussed the question of the legal relationship between the present articles and customary rules on the same subject and that that question would be decided when the final version of the future instrument was prepared.

It was so agreed.

The commentary to article 32, as amended, was approved.

The meeting rose at 1.10 p.m.

2146th MEETING

Thursday, 20 July 1989, at 3 p.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its forty-first session (*continued*)

CHAPTER II. ***Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier*** (concluded) (A/CN.4/L.435 and Add.1-4 and Add.4/Corr.1)

D. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*concluded*) (A/CN.4/L.435/Add.1-4 and Add.4/Corr.1)

Commentary to article 12 (The diplomatic courier declared *persona non grata* or not acceptable) (*concluded*)*

Paragraph (6) (*concluded*)

1. Mr. EIRIKSSON recalled that the Commission had left open the possibility of reverting to paragraph (6), approved at the 2144th meeting, pending a decision on the commentary to article 21, which had now been approved.

2. Mr. YANKOV (Special Rapporteur) proposed that the last five sentences of paragraph (6) should be replaced by the following text:

"Paragraph 2 of article 12 refers to the refusal or failure of the sending State to carry out its obligations under paragraph 1. It is therefore concerned with the termination of the functions of the courier. It is only after the sending State has failed to comply with its obligation to recall the courier or terminate his functions that the receiving State may cease to recognize the person concerned as a diplomatic courier and treat him as an ordinary foreign visitor or temporary resident. The second part of the first sentence of paragraph 2 of article 21 refers to the cessation of the courier's privileges and immunities when he has not left the territory of the receiving State within a reasonable period."

It was so agreed.

Commentary to draft Optional Protocol One on the Status of the Courier and the Bag of Special Missions (A/CN.4/L.435/Add.4)

Paragraph (1)

3. Mr. YANKOV (Special Rapporteur) said that the word "approach", in the third sentence, should be replaced by "régime".

4. Mr. McCAFFREY proposed that the words "The Commission felt that", in the fifth sentence, should be deleted.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were approved.

The commentary to draft Optional Protocol One on the Status of the Courier and the Bag of Special Missions, as amended, was approved.

Commentary to draft Optional Protocol Two on the Status of the Courier and the Bag of International Organizations of a Universal Character (A/CN.4/L.435/Add.4).

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

5. Mr. CALERO RODRIGUES proposed that the word "felt", in the second sentence, should be replaced by "believed".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were approved.

The commentary to draft Optional Protocol Two on the Status of the Courier and the Bag of International Organizations of a Universal Character, as amended, was approved.

Section D, as amended, was adopted.

A. Introduction (A/CN.4/L.435)

Paragraphs 1 to 32

Paragraphs 1 to 32 were adopted.

Paragraph 33

6. Mr. McCAFFREY said that the words "as much as possible coherent legal régime", in the first sentence, should be replaced by "as coherent a legal régime as possible".

It was so agreed.

Paragraph 33, as amended, was adopted.

Paragraphs 34 and 35

Paragraphs 34 and 35 were adopted.

Paragraph 36

7. Mr. McCAFFREY said that the word "their", at the end of the second sentence, should be replaced by "his".

It was so agreed.

Paragraph 36, as amended, was adopted.

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* Resumed from the 2144th meeting.

Paragraphs 37 to 42

Paragraphs 37 to 42 were adopted.

Paragraph 43

8. Mr. McCAFFREY proposed that a cross-reference to paragraph 43 should be made in the commentary to article 32, possibly by means of a footnote.

It was so agreed.

Paragraph 43 was adopted.

New paragraph 43 *bis*

9. Mr. YANKOV (Special Rapporteur) said that the following new paragraph 43 *bis* should be added:

"The Commission did not include in the draft articles a provision on the relationship between the present articles and the rules of customary international law. Nevertheless, a view was expressed in the Commission that an additional provision on this matter might be deemed appropriate in a future instrument on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier."

New paragraph 43 bis *was adopted.*

Paragraphs 44 to 47

Paragraphs 44 to 47 were adopted.

Section A, as amended, was adopted.

B. Recommendation of the Commission (A/CN.4/L.435)

Paragraphs 48 to 50

Paragraphs 48 to 50 were adopted.

Paragraph 51

10. Mr. BENNOUNA (Rapporteur) said that the words "a binding instrument with the same legal hierarchy within the international legal order", at the end of the paragraph, should be replaced by "a multilateral binding instrument".

Paragraph 51, as amended, was adopted.

Paragraph 52

11. The CHAIRMAN suggested that the last sentence should be deleted.

12. Mr. EIRIKSSON, agreeing with that suggestion, proposed that the words "which may express a firm commitment of the participating States, thus facilitating and expediting, at a later stage, a quicker process of ratification and of entry into force", in the second sentence, should also be deleted. He also wondered whether the statement in the third sentence, and in particular the reference to international organizations, was sufficient justification for convening a conference at the plenipotentiary level.

13. Mr. McCAFFREY said that he did not think the Commission had the necessary standing to discuss the issue, nor did he like the way in which paragraph 52 was framed. He therefore proposed that the paragraph should be deleted in its entirety.

14. Mr. FRANCIS said that he was in favour of retaining paragraph 52, but it should be couched in more neutral terms, omitting any reference to the Sixth Committee of the General Assembly.

15. Mr. BARSEGOV said that he saw no reason why the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier should receive less favourable treatment than other drafts. In his view, it would be entirely appropriate to consider the matter at a plenipotentiary conference and he would be opposed to any decision to the contrary.

16. Mr. TOMUSCHAT said that a compromise solution might be to delete the part of paragraph 52 beginning "The careful study by Governments . . .".

17. Mr. MAHIOU said that he fully endorsed that idea. Mr. Barsegov need not be concerned about deletion of the reference to a plenipotentiary conference, for the convening of such a conference was recommended in paragraph 48.

18. Mr. YANKOV (Special Rapporteur) said that he could accept the deletion of the last part of paragraph 52 but would not agree to the drastic step of deleting the entire paragraph. There was substantive material in the paragraph that must be retained. If he had developed a number of lines of reasoning, it was to counter the reservations he had detected in his 10 years of work on the topic—for the draft articles were, in a sense, the Commission's unwanted child.

19. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the portion of paragraph 52 beginning with the words "The careful study by Governments . . .", in the second sentence.

It was so agreed.

Paragraph 52, as amended, was adopted.

Section B, as amended, was adopted.

20. Mr. DÍAZ GONZÁLEZ drew the attention of the Secretariat to the need to correct the Spanish text of chapter II of the report and ensure that the proper terminology was used throughout: for example, the word *estafeta* should be replaced by *correo.*

C. Resolution adopted by the Commission (A/CN.4/L.435)

21. The CHAIRMAN invited the Commission to consider the draft resolution in section C, which read:

"*The International Law Commission,*

"*Having adopted* the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier,

"*Desires to express* to the Special Rapporteur, Mr. Alexander Yankov, its deep appreciation of the invaluable contribution he has made to the preparation of the draft throughout these past years by his tireless devotion and incessant labour, which have enabled the Commission to bring this important task to a successful conclusion."

22. The Commission had now concluded its work on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It could look back at the important work it had accomplished in a relatively short period of time and thank the Special Rapporteur who had made it all possible. Over the years, Mr. Yankov had nourished and protected the Commission's child—even if it was an unwanted one. The scholarly research, patience and diplomatic skill that had gone into that effort were well known to all. He wished to thank Mr. Yankov, who had devoted so much energy, experience and expertise to his important task. Now that that task was concluded, it was to be hoped that the draft articles could be elevated to the status of a universal convention.

23. Mr. BENNOUNA, speaking on behalf of members of the Commission from African countries, congratulated the Special Rapporteur, whose knowledge and experience, added to his innate calm and courtesy, had enabled the Commission to reach its goal. The scepticism prevailing at the outset of the Commission's work had not made the Special Rapporteur's task easy. It was now to be hoped that a diplomatic conference would be convened for the adoption of the draft articles.

24. Mr. DÍAZ GONZÁLEZ, speaking on behalf of members of the Commission from Latin-American countries, said that the road to completion of the draft articles had not been an easy one. A number of Governments, including his own, had been reluctant to condone the Commission's work on the topic. Yet, thanks to the efforts of the Special Rapporteur, the Commission now had yet another concrete achievement to present to the General Assembly. It was to be hoped that the Special Rapporteur's efforts would culminate in the adoption of the draft articles at a diplomatic conference.

25. Mr. BARBOZA said that, in completing its work on the draft articles, the Commission had made an important contribution to the codification of international law. The draft instrument it had produced was well crafted and it was to be hoped that it would be adopted at a diplomatic conference, as other instruments in the same field had been. The Commission's achievement would not have been possible without the patient, able and, indeed, exemplary stewardship of the Special Rapporteur.

26. Mr. SHI, speaking on behalf of members of the Commission from Asian countries, expressed deep appreciation to Mr. Yankov, in whom the Commission had found all the qualities required of an excellent Special Rapporteur. He had dedicated himself to work on the topic with unflagging zeal and an open mind. He deserved thanks for all his efforts, as did the Secretariat for its invaluable assistance.

27. Mr. PAWLAK, speaking on behalf of members of the Commission from Eastern European countries, congratulated the Special Rapporteur on his productive efforts, which had materialized in the adoption of a set of draft articles that constituted an intelligent and well balanced approach to the topic. He merited thanks for the devotion and expertise he had brought to bear on his task.

28. Mr. ROUCOUNAS, speaking on behalf of members of the Commission from Western European and other States, congratulated the Special Rapporteur on the accomplishment of his task and commended him for his perseverance and technical expertise. The contribution to the codification of international law represented by the draft articles was already widely appreciated.

29. Mr. McCAFFREY, referring to the draft resolution before the Commission, suggested that the words "technical expertise" should be inserted between the words "tireless devotion" and "and incessant labour".

30. Mr. PAWLAK suggested that the word "technical" in that amendment should be replaced by "professional".

Mr. McCaffrey's amendment, as modified by Mr. Pawlak, was adopted.

The draft resolution, as amended, was adopted.

Section C, as amended, was adopted.

Chapter II of the draft report, as amended, was adopted.

31. Mr. YANKOV (Special Rapporteur) expressed his gratitude to the Chairman and to all his colleagues, whose avid interest in the drafting work had been his strongest asset. It meant a great deal to know that, even through arduous negotiations and disagreements, they could still remain friends. He was pleased to think that the accomplishment of his task also marked the end of the Commission's work on the entire topic and represented yet another concrete achievement to present to the international community.

32. He wished to pay a tribute to those members and former members of the Secretariat who had given him such valuable assistance over the years, beginning with Mr. Torres Bernárdez and culminating most recently with Mr. Rama-Montaldo. The Secretariat staff and members of the Codification Division with whom he had been associated were prime examples of people who worked in the service of the international community and sought to promote international law. He was honoured to have been part of the Commission's important work, and hoped that the draft articles would be successfully adopted by the international community.

CHAPTER III. ***Draft Code of Crimes against the Peace and Security of Mankind*** (A/CN.4/L.436 and Add.1-3)

A. Introduction (A/CN.4/L.436)

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Paragraph 9

33. Mr. McCAFFREY remarked that, in comparison with other chapters of the draft report, the introduction to the chapter under consideration, and in particular paragraph 9, contained a somewhat disproportionate amount of substance. In his view, only the first sentence of the paragraph should be retained.

34. Mr. BARSEGOV said that he disagreed. The historical summary provided in paragraph 9 covered an important stage in the consideration of the topic. Referring to the word "offences" in the first sentence, he said he wondered whether, in view of the General Assembly's decision in that regard, it would not be more appropriate to speak of "crimes".

35. Mr. CALERO RODRIGUES suggested that a footnote should be added to paragraph 5 indicating that, in 1987, the General Assembly had decided to amend the title of the topic in English to read: "Draft Code of Crimes against the Peace and Security of Mankind".

It was so agreed.

36. Mr. THIAM (Special Rapporteur) said that the text of paragraph 9 corresponded, in shortened form, to that included in earlier reports. He proposed that the paragraph should be adopted without change.

It was so agreed.

Paragraph 9 was adopted.

Paragraph 10

Paragraph 10 was adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.436 and Add. 1-3)

Paragraphs 11 to 14 (A/CN.4/L.436)

Paragraphs 11 to 14 were adopted.

Paragraphs 1 to 57 (A/CN.4/L.436/Add.1)

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraph 5

37. Mr. THIAM (Special Rapporteur) said that the word "only", before the words "grave breaches" in the second sentence, should be deleted.

38. Mr. BARSEGOV drew attention to serious errors in the Russian text of paragraph 5, adding that the Russian text of chapter III as a whole required careful revision.

Paragraph 5, as amended, was adopted.

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

Paragraph 8

39. Mr. THIAM (Special Rapporteur) said that the words "The Special Rapporteur", at the beginning of the paragraph, should be replaced by "However, he" and that the words "cast a wide net", in the third sentence, should be replaced by "adopt a broad interpretation of that Law".

Paragraph 8, as amended, was adopted.

Paragraphs 9 to 11

Paragraphs 9 to 11 were adopted.

Paragraph 12

40. Mr. THIAM (Special Rapporteur) said that the third sentence should be amended to read: "The determination of gravity was incumbent on the Commission, which therefore had to provide a list of . . .". In the next sentence, the words "a judicial function" should be replaced by "for a court".

41. After a discussion in which Mr. McCAFFREY, Mr. BARBOZA and Mr. MAHIOU took part, Mr. CALERO RODRIGUES proposed that the words "The first was to do so", at the beginning of the second sentence, should be replaced by "On the one hand, that could be done" and that the word "Moreover", at the beginning of the fourth sentence, should be replaced by the words "On the other hand".

It was so agreed.

Paragraph 12, as amended, was adopted.

Paragraph 13

42. Mr. THIAM (Special Rapporteur) said that the words "One member", at the beginning of the paragraph, should be replaced by "Some members".

Paragraph 13, as amended, was adopted.

Paragraph 14

43. Mr. THIAM (Special Rapporteur) said that the words "one member", in the first sentence, should be replaced by "it was".

Paragraph 14, as amended, was adopted.

Paragraph 15

44. Mr. TOMUSCHAT said that the word "had", between the words "in particular" and "pointed out" in the second sentence, should be deleted.

It was so agreed.

Paragraph 15, as amended, was adopted.

Paragraph 16

45. Mr. McCAFFREY said that, since the statement reported in paragraph 16 had not been made by the Special Rapporteur, the words "In reply", at the beginning of the sentence, should be replaced by "With reference".

It was so agreed.

Paragraph 16, as amended, was adopted.

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

46. Mr. THIAM (Special Rapporteur) said that the words "humanitarian law", in the penultimate sentence, should be replaced by "the law of war".

47. Mr. McCAFFREY said that the words "There had been", at the beginning of the paragraph, should be replaced by "There was" and that the word "had", between the words "members" and "however" in the penultimate sentence, should be deleted.

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

Paragraph 19 was adopted.

Paragraph 20

48. Mr. BENNOUNA (Rapporteur) proposed that the words "internal and external conflicts", in the first sentence, should be replaced by "internal conflicts and external intervention in those conflicts" and that the words "as well as to armed conflict within States", at the end of the paragraph, should be deleted.

49. Mr. McCAFFREY said that, while he did not object to that proposal, he none the less considered that statements made during the debate should be reflected faithfully in the Commission's report.

50. Mr. THIAM (Special Rapporteur) said that he would review the text of paragraph 20 with the help of the secretariat.

Paragraph 20 was adopted on that understanding.

Paragraph 21

Paragraph 21 was adopted.

Paragraph 22

51. After a brief discussion in which Mr. THIAM (Special Rapporteur) and Mr. CALERO RODRIGUES took part, Mr. TOMUSCHAT proposed that the words "related to the protection of victims of", in the first sentence, should be replaced by "covered not only", with consequential deletion of the word "to" in the remaining part of the sentence.

It was so agreed.

Paragraph 22, as amended, was adopted.

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

52. Mr. McCAFFREY proposed that the word "crimes" should be replaced by "offences" and that the word "offences" should be replaced by the words "war crimes".

It was so agreed.

Paragraph 24, as amended, was adopted.

Paragraph 25

53. Mr. BENNOUNA (Rapporteur) said that paragraph 25 should be merged with the preceding paragraph.

Paragraph 25, as amended, was adopted.

Paragraphs 26 to 29

Paragraphs 26 to 29 were adopted.

Paragraph 30

54. Mr. McCAFFREY, supported by Mr. TOMUSCHAT, proposed that only the first sentence of the paragraph should be retained, the remainder being deleted.

It was so agreed.

Paragraph 30, as amended, was adopted.

Paragraphs 31 to 34

Paragraphs 31 to 34 were adopted.

Paragraph 35

55. Mr. THIAM (Special Rapporteur) said that the words "which would not be listed in the draft code", at the end of the paragraph, should be deleted.

Paragraph 35, as amended, was adopted.

Paragraphs 36 to 39

Paragraphs 36 to 39 were adopted.

Paragraph 40

56. Mr. BENNOUNA (Rapporteur) said that paragraph 40 should be deleted. Its sole purpose was to correct a terminological error that affected only the English text.

It was so agreed.

Paragraphs 41 to 48

Paragraphs 41 to 48 were adopted.

Paragraph 49

57. Mr. THIAM (Special Rapporteur) said that the words "competent body", in the second sentence, should be replaced by "appropriate body".

58. Mr. TOMUSCHAT proposed that the words "had been implemented by States", in the third sentence, should be replaced by "had crystallized". It was the emergence of the rule that was material, rather than the fact that it was implemented by States.

It was so agreed.

59. Mr. THIAM (Special Rapporteur) said that the last sentence should be shortened by deleting the part beginning: "because, among other things . . .". The sentence would thus simply refer to the opposition of certain members of the Commission to the attribution of responsibility for the crime of first use of nuclear weapons.

60. Mr. CALERO RODRIGUES pointed out that it would not be accurate to speak of a "crime" where responsibility had not been attributed. The last sentence should state that some members were opposed to considering or characterizing the first use of nuclear weapons as a crime.

61. The CHAIRMAN suggested that the last sentence of paragraph 49, as shortened by the Special Rapporteur, should be amended to read: "Some members were particularly opposed to characterizing the first use of nuclear weapons as a crime."

It was so agreed.

Paragraph 49, as amended, was adopted.

Paragraph 50

62. Mr. BARSEGOV pointed out that the use of nuclear weapons was a major crime against the peace and security of mankind, as grave as genocide. The last part of paragraph 50, reading "but also a crime against peace and a crime against humanity", should be replaced by the words "but also a crime against humanity".

It was so agreed.

63. Mr. McCAFFREY suggested inserting the words "what they characterized as" after the words "could not conceive that", in the first sentence, in order to indicate that the opinion expressed in that sentence was attributable to the "Other members" mentioned.

It was so agreed.

Paragraph 50, as amended, was adopted.

Paragraph 51

64. Mr. McCAFFREY proposed that the words "in the list of war crimes", in the second sentence, should be replaced by "in the list of war crimes, or in a separate article".

It was so agreed.

Paragraph 51, as amended, was adopted.

Paragraphs 52 to 57

Paragraphs 52 to 57 were adopted.

Paragraphs 1 to 58 (A/CN.4/L.436/Add.2)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

65. Mr. TOMUSCHAT pointed out that it would be necessary to correct the tenses of some of the verbs in paragraph 4 and in the following paragraphs.

Paragraph 4 was adopted.

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

66. Mr. CALERO RODRIGUES proposed that the somewhat awkward expression "natural persons", in the first sentence, should be replaced by "individuals".

It was so agreed.

Paragraph 6, as amended, was adopted.

Paragraph 7

67. Mr. TOMUSCHAT proposed that the lengthy quotation of the views of the United Nations War Crimes Commission should be deleted.

68. Mr. PAWLAK said that he was strongly opposed to that proposal. The quotation from such an authoritative source was most valuable and should be retained.

69. Mr. RAZAFINDRALAMBO said that the quotation could perhaps be replaced by a reference in a footnote, without reproducing the actual text.

70. Mr. THIAM (Special Rapporteur) pointed out that the United Nations War Crimes Commission had been the official body entrusted, during and after the Second World War, with the investigation and prosecution of war crimes. Its pronouncements were therefore of great importance in

shaping the doctrine of the International Law Commission on the subject.

71. Mr. BARSEGOV urged that the valuable quotation in question be retained.

72. Mr. DÍAZ GONZÁLEZ said that the passage cited was no ordinary quotation; it came from a most authoritative source.

Paragraph 7 was adopted.

Paragraph 8

73. Mr. McCAFFREY proposed that the first sentence, which contained a quotation from Meyrowitz, should be deleted.

74. Mr. TOMUSCHAT said that quotations from writers had a place in the reports of special rapporteurs, but, in the Commission's own report to the General Assembly, such quotations should be avoided.

75. Mr. BARSEGOV pointed out that the short quotation served to set out the question of mass crimes. If the quotation were to be deleted, that useful element in the first sentence would be lost. Besides, Meyrowitz was one of the leading scholars on the subject of crimes against the peace and security of mankind.

76. Mr. PAWLAK said that it was essential to reflect the important distinction between mass crimes and crimes against individuals, which was the subject of the passage quoted.

77. The CHAIRMAN, speaking as a member of the Commission, agreed that the reference to the distinction between mass crimes and crimes against individuals should be retained.

78. Mr. YANKOV said that perhaps quotations could be made more brief, or their substance could be summarized, so as to respond to the request of the General Assembly for shorter reports.

79. Mr. DÍAZ GONZÁLEZ said that not all quotations could be treated alike. The one from Meyrowitz in paragraph 8 was necessary, in view of the limited material on the subject available to the Commission. He would, once again, emphasize the importance of the question of sources.

80. Mr. MAHIOU proposed that the quotation from Meyrowitz should be transferred to a footnote.

It was so agreed.

Paragraph 8, as amended, was adopted.

Paragraphs 9 to 13

Paragraphs 9 to 13 were adopted.

Paragraph 14

81. Mr. THIAM (Special Rapporteur) said that the second sentence should end with the words "destruction of human culture". The remainder of the sentence should be replaced by a new sentence reading: "In addition, the motive of the crime was an important element."

Paragraph 14, as amended, was adopted.

Paragraphs 15 to 21

Paragraphs 15 to 21 were adopted.

Paragraph 22

82. Mr. McCAFFREY queried the use of the expression "The great majority of members", in the second sentence. The usual expression was "most members."

83. Mr. THIAM (Special Rapporteur) said that the use of the expression was borne out by the facts: there had indeed been a large majority in favour of the second alternative text.

Paragraph 22 was adopted.

Paragraph 23

84. Mr. THIAM (Special Rapporteur) said that the words "some members", in the third sentence, should be replaced by "one member".

85. Mr. MAHIOU said that a consequential amendment in the last sentence would be to replace the words "these members" by "that member".

It was so agreed.

Paragraph 23, as amended, was adopted.

Paragraphs 24 to 26

Paragraphs 24 to 26 were adopted.

Paragraph 27

86. Mr. THIAM (Special Rapporteur) said that the last part of the last sentence, reading "which would dispel the doubts of several States about acceding to the Convention on that crime", should be deleted.

Paragraph 27, as amended, was adopted.

Paragraph 28

Paragraph 28 was adopted.

Paragraph 29

87. Responding to a comment by Mr. THIAM (Special Rapporteur), Mr. CALERO RODRIGUES suggested that the word "ordinary", in the fourth sentence, should be deleted.

It was so agreed.

Paragraph 29, as amended, was adopted.

Paragraph 30

Paragraph 30 was adopted.

Paragraph 31

88. After a brief discussion in which Mr. CALERO RODRIGUES, Mr. PAWLAK and Mr. TOMUSCHAT took part, the CHAIRMAN suggested that the authentic text for the first sentence should be the French, and that the other language versions, particularly the English, should be brought into line with it.

It was so agreed.

Paragraph 31 was adopted.

Paragraphs 32 to 34

Paragraphs 32 to 34 were adopted.

Paragraph 35

Paragraph 35 was adopted subject to a correction in the Russian text.

Paragraph 36

89. Mr. PAWLAK proposed that the words "conquered Powers", in the first sentence, should be replaced by "countries occupied by the Allied Powers".

It was so agreed.

Paragraph 36, as amended, was adopted.

Paragraph 37

Paragraph 37 was adopted.

Paragraph 38

90. Mr. BENNOUNA (Rapporteur) suggested that paragraph 38 should be combined with paragraph 39.

91. Mr. TOMUSCHAT, supported by Mr CALERO RODRIGUES, said that paragraph 38 formed an introduction to paragraphs 39 to 41 and should remain separate.

Paragraph 38 was adopted.

Paragraphs 39 and 40

Paragraphs 39 and 40 were adopted.

Paragraph 41

92. Mr. THIAM (Special Rapporteur) said that the words "another crime, namely" should be inserted between the words "consequence of" and "the expulsion" in the second sentence.

Paragraph 41, as amended, was adopted.

Paragraphs 42 to 45

Paragraphs 42 to 45 were adopted.

Paragraph 46

93. Mr. TOMUSCHAT suggested that the quotation from a decision of the Supreme Court of the British Zone should be deleted, as it was redundant.

94. Mr. THIAM (Special Rapporteur) said that the quotation was an important element of jurisprudence and should not be deleted. If necessary, it could be incorporated in a footnote.

95. Mr. McCAFFREY said that he fully agreed with Mr. Tomuschat and would further point out that chapter III of the draft report contained a large number of passages reflecting the opinions of the Special Rapporteur, something that he himself had been criticized for including in chapter VII. Mr. Díaz González had pointed out (2141st meeting) that such practice created confusion in the Sixth Committee of the General Assembly: representatives were led to comment on the special rapporteur's opinions, rather than on the views of the Commission. He was now inclined to agree with that point of view, and would urge that, early during the Commission's next session, the secretariat, the Rapporteur and the special rapporteurs should meet with a view to deciding on a structure for the report in which each of the topics on the agenda was given equal treatment.

96. The CHAIRMAN pointed out that the Rapporteur had already made a similar suggestion, which would certainly be followed.

97. Mr. NJENGA said that paragraph 46 under consideration dealt with the destruction of property, which was a new area of concern for the Commission. The quotation it contained provided justification for the Commission's position and should not be deleted. If necessary, however, it could be incorporated in a footnote.

98. Mr. BARSEGOV said that, on the whole, he was in favour of reducing the length of the Commission's report, but paragraph 46 contained very important material. Destruction of property was often the starting-point for acts of genocide, as anyone familiar with the history of such acts knew.

99. The CHAIRMAN suggested that the quotation in paragraph 46 should be incorporated in a footnote.

It was so agreed.

Paragraph 46, as amended, was adopted.

Paragraphs 47 to 58

Paragraphs 47 to 58 were adopted.

The meeting rose at 7 p.m.

2147th MEETING

Friday, 21 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its forty-first session (*continued*)

CHAPTER III. ***Draft Code of Crimes against the Peace and Security of Mankind*** (continued) (A/CN.4/L.436 and Add.1-3)

B. Consideration of the topic at the present session (*concluded*) (A/CN.4/L.436 and Add.1-3)

Paragraphs 59 to 78 (A/CN.4/L.436/Add.2)

Heading preceding paragraph 59

1. Mr. BARSEGOV proposed that the words "for mankind" should be added after the words "of vital importance" in the heading.

It was so agreed.

2. Mr. McCAFFREY proposed that the words "and assets" should be added after the word "property".

It was so agreed.

The heading preceding paragraph 59, as amended, was adopted.

Paragraphs 59 to 71

Paragraphs 59 to 71 were adopted.

Paragraph 72

3. Mr. McCAFFREY proposed that the second sentence should be amended to read: "It was also important to avoid the possibility of over-politicization of the code in national courts."

4. Mr. BARSEGOV proposed the following wording: ". . . the possibility of over-politicization of the code's application . . .".

Mr. McCaffrey's amendment, as modified by Mr. Barsegov, was adopted.

Paragraph 72, as amended, was adopted.

Paragraph 73

Paragraph 73 was adopted.

Paragraph 74

Paragraph 74 was adopted with some drafting changes.

Paragraphs 75 and 76

Paragraphs 75 and 76 were adopted.

Paragraph 77

5. Mr. CALERO RODRIGUES said that there should be a new heading to introduce paragraphs 77 and 78, which were unrelated to the preceding paragraphs.

6. The CHAIRMAN said that that drafting point would be taken into account by the secretariat.

Paragraph 77 was adopted with some drafting changes in the Russian text.

Paragraph 78

Paragraph 78 was adopted.

Paragraphs 79 and 80 (A/CN.4/L.436/Add.3)

7. Mr. CALERO RODRIGUES said that, although he had no objection to paragraphs 79 and 80, he did not think that their inclusion was necessary, since draft article 16 was still being considered by the Drafting Committee.

8. Mr. McCAFFREY said that he agreed with Mr. Calero Rodrigues.

9. Mr. BARSEGOV said that, in his view, the attention of the General Assembly should be drawn to the problems to which draft article 16 gave rise.

10. Mr. SEPÚLVEDA GUTIÉRREZ said that he, too, thought that the General Assembly should be informed of the problems raised by draft article 16, because its views would be helpful to the Commission in its future work.

11. Mr. ROUCOUNAS said that he shared the views of Mr. Calero Rodrigues. The Drafting Committee had, of course, considered draft article 16, but contrary to what was stated in paragraph 80 it had not "arrived at" a text.

12. Mr. McCAFFREY said that, if the text of draft article 16 were retained in the Commission's report, the Commission would be inviting the General Assembly to state its views on that text, even though opinions in the Commission were still very much divided. That would be a regrettable mistake. The text had to be examined again at the next session, not only in the Drafting Committee, but also in plenary.

13. Mr. PAWLAK said that he did not see any harm in submitting to the General Assembly for its information a text which appeared only in a footnote. In order to meet Mr. McCaffrey's concerns, he proposed that the report should explain that the Commission would revert to the text in question in plenary at its next session.

14. The CHAIRMAN suggested that, as a compromise, the words "The text arrived at by the Drafting Committee after discussion over several meetings", at the beginning of paragraph 80, should be replaced by "The text discussed by the Drafting Committee at several meetings".

15. Mr. JACOVIDES said that he agreed with the comments made by Mr. Roucounas and Mr. McCaffrey.

16. Mr. BENNOUNA (Rapporteur) said that there was no need to inform the General Assembly of the Drafting Committee's work and paragraph 79 alone would suffice. He proposed that a footnote should simply be added to indicate where the text of draft article 16 could be found.

17. Mr. BEESLEY said that he agreed with the comments made by Mr. Roucounas, Mr. McCaffrey and the Rapporteur. To reproduce the text of draft article 16 in the Commission's report would give it authority it did not have, since it had not been considered by the Commission and had also been categorically rejected by one of its members. The text therefore did not really exist. It would be an unfortunate precedent to retain it in the report.

18. Mr. TOMUSCHAT suggested that the text originally proposed by the Special Rapporteur should be reproduced in a footnote to paragraph 79.

19. Mr. YANKOV supported that proposal.

20. The CHAIRMAN proposed that paragraph 79 should be left as it stood, with the addition, at the end, of the words "but could not agree on a text". A footnote would be added containing the text originally proposed by the Special Rapporteur which corresponded to draft article 16, introduced by the words "The text originally proposed by the Special Rapporteur read as follows". The footnote would also indicate at which meeting the Chairman of the Drafting Committee had reported to the Commission on the Drafting Committee's work on that article.

21. Mr. RAZAFINDRALAMBO said that, for the sake of clarity, the words "deriving from a treaty and concerning disarmament, arms control and arms prohibition" should be added at the end of the original paragraph 79.

22. Mr. OGISO supported the proposal made by the Chairman.

23. Mr. REUTER said that he also supported the Chairman's proposal. It was, moreover, quite normal—and a common practice in the Commission—to draw the General Assembly's attention to such a sensitive issue, on which it might offer some guidance.

24. Mr. BEESLEY said that he had some reservations about reproducing the text of draft article 16 in the Commission's report but would not oppose doing so.

25. Mr. CALERO RODRIGUES said it should be explained in the report that the Drafting Committee had not had time to complete its consideration of draft article 16. He repeated that he had doubts about the advisability of including paragraphs 79 and 80 in the Commission's report to the General Assembly, either by way of information or for comments.

26. Mr. DÍAZ GONZÁLEZ said that he shared Mr. Calero Rodrigues's view and also believed that the Commission did not have to keep the General Assembly informed of the Drafting Committee's work.

27. Mr. EIRIKSSON said that he endorsed the comments made by Mr. Calero Rodrigues and Mr. Díaz González.

28. Mr. THIAM (Special Rapporteur) said that he supported the proposal made by the Chairman, but suggested that the word "yet" should be inserted between the words "not" and "agree" in the proposed addition to paragraph 79.

29. Mr. BEESLEY said that he supported the Chairman's proposal, as modified by the Special Rapporteur.

30. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 79 with the amendments proposed by him (para. 20 above), as modified by the Special Rapporteur, and to delete paragraph 80.

It was so agreed.

Paragraph 79, as amended, was adopted.

Section B, as amended, was adopted.

C. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/L.436/Add.3)

SUBSECTION 1 (Texts of the draft articles provisionally adopted so far by the Commission)

Section C.1 was adopted.

SUBSECTION 2 (Texts of draft articles 13, 14 and 15, with commentaries thereto, provisionally adopted by the Commission at its forty-first session)

31. Mr. McCAFFREY said that, in general, he had serious reservations about the commentaries to articles 13, 14 and 15. They were unbalanced and did not properly explain the articles. They also raised questions which the Commission had not discussed and were based on sources that were controversial and perhaps even irrelevant. He also regretted that the commentaries gave the impression of lacking in seriousness and was afraid that, as a result, the General Assembly might not realize how important the topic was.

32. In addition, the commentaries had been distributed only the previous day and members of the Commission had not had enough time to give them as much consideration as they deserved in view of their importance.

33. Mr. BEESLEY said that he did not mean to criticize the Special Rapporteur's work, but thought that the commentaries under consideration should be discussed paragraph by paragraph, like all other commentaries to articles. If the Commission did not do so because of the lack of time or for other reasons, he would have to formulate serious reservations concerning those texts.

34. Mr. THIAM (Special Rapporteur) said that the commentaries faithfully reflected the views which had been expressed in the Commission and he was prepared to reply to any criticism, provided that it was specific enough. The reason for the late distribution was that he had had very little time to prepare the commentaries after the Drafting Committee had completed its work. Some time had also been necessary for translation and reproduction after he had submitted the texts to the secretariat and before they had been distributed to the members of the Commission.

35. Mr. BARSEGOV, supported by Mr. TOMUSCHAT, said that the commentaries to articles were usually very important and the members of the Commission had to have enough time to consider them. That was, moreover, true of all the topics with which the Commission was dealing.

36. Mr. McCAFFREY said that it had not been his intention to blame the Special Rapporteur for the late distribution of the commentaries. He would simply like the Commission to organize its work in such a way that the text of commentaries would be distributed in time to be considered.

Commentary to article 13 (Threat of aggression)

Paragraph (1)

37. Mr. TOMUSCHAT said that, in criminal law, it was not possible, as stated in the first sentence of the commentary, "to formulate an entirely general definition that would leave it to the judge to determine . . .", because that would mean leaving matters entirely in the hands of the judge. He therefore proposed that those words should be amended to read: "to formulate a general definition that would leave the judge some discretionary power".

38. Mr. ARANGIO-RUIZ said that he did not like the words "discretionary power", which would have the opposite result of what Mr. Tomuschat wanted, namely to limit the judge's freedom. He did, however, agree that the word "entirely" before the word "general" should be deleted.

39. After an exchange of views, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the word "entirely", as well as the words "that would leave it to the judge to determine in each particular case whether the acts invoked constituted a threat or not", in the first sentence of paragraph (1), in accordance with Mr. Tomuschat's suggestion.

It was so agreed.

40. Mr. BARBOZA said that the words "very precise directives", also in the first sentence, were inappropriate and should be replaced by the word "examples". He also proposed that the words "in advance" and "itself" should be deleted.

41. Mr. ARANGIO-RUIZ said he agreed that the words "in advance" and "itself" should be deleted, but did not think that the word "examples" was an improvement. He therefore proposed that the words "precise criteria" should be used.

42. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the words "in advance", in the first sentence of paragraph (1), and to replace the words "very precise directives" by "precise criteria".

It was so agreed.

43. Mr. McCAFFREY said that it should also be explained in paragraph (1) of the commentary, or even at the end of paragraph 79 in section B, why the Commission had decided, in article 13, not to follow the approach taken in the case of article 12 (Aggression), paragraph 1 of which was an introductory provision relating to the attribution of the offence to an individual.

44. The CHAIRMAN said that the Commission could explain that point in its next report.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

45. Mr. McCAFFREY said that the word "differences", in the first sentence, should be replaced by "disputes".

46. Mr. CALERO RODRIGUES said that, in his view, the word "differences" should be deleted and only the words "situations" and "isolated acts" should be retained.

Mr. McCaffrey's amendment was adopted.

47. Mr. TOMUSCHAT said that the words "expresses an intention, sometimes even blackmail, tending to make a State believe", in the sixth sentence, were inappropriate and should be replaced by "denotes acts undertaken with a view to making a State believe".

It was so agreed.

48. In the last sentence, the word "consist" should be replaced by "be" and the word "in", which appeared twice, should be deleted.

49. Mr. McCAFFREY said he did not recall that the Commission had decided that measures of a political, administrative or economic nature could constitute a threat of aggression. He therefore proposed that the last sentence should be deleted.

50. Mr. THIAM (Special Rapporteur) said that, although he would not oppose the deletion of the last sentence, he thought that the measures in question were necessarily of a political, administrative or economic nature.

51. Mr. EIRIKSSON said that he, too, was in favour of the deletion of the last sentence, if only because the penultimate sentence was clear enough to explain that the enumeration was indicative.

52. Mr. NJENGA said that he agreed with the Special Rapporteur's view, but did not think that it had to be stated in the commentary. The deletion of the last sentence of paragraph (3) would solve the problem.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

53. Mr. YANKOV, supported by Mr. ARANGIO-RUIZ, said that the words "an impartial third organ", in the first sentence, were inappropriate because they might also refer to a mediator, for example. He therefore proposed that the end of that sentence should be amended to read: ". . . objective elements verifiable impartially".

54. Mr. McCAFFREY proposed that the words "to believe in the imminence of the aggression", in the fourth sentence, should be replaced by "to believe that aggression was imminent" and that the words "fugitive or", in the fifth sentence, should be deleted;

It was so agreed.

55. In the last sentence, the words "serious guarantees" should be replaced by "reliable guarantees".

56. Mr. THIAM (Special Rapporteur) said that, in the French text, he would like the words *les garanties les plus sérieuses* to be retained.

57. Following a brief discussion in which Mr. BEESLEY, Mr. ARANGIO-RUIZ, Mr. BARBOZA and Mr. DÍAZ GONZÁLEZ took part, the CHAIRMAN suggested that, in the last sentence of paragraph (4), the word "serious" should be replaced by "adequate".

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

58. Mr. ROUCOUNAS proposed that the first sentence should be amended to read: ". . . the threat of aggression did not justify the threatened State in resorting to force in the exercise of the right of self-defence . . .".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

59. Mr. TOMUSCHAT said that the words "the competence of the judicial organ" should be replaced by "the competence of a court or tribunal called upon to adjudicate".

It was so agreed.

60. Mr. McCAFFREY said that paragraph (6) did not reflect the views expressed during the meeting, particularly by him. It simply referred to the commentary to article 12 contained in the Commission's previous report.

61. Mr. BEESLEY said that he, too, found paragraph (6) inadequate because it implied that the problems raised by the threat of aggression were similar to those raised by the crime of aggression, whereas what the Commission had discussed was the differences between those two types of problems.

62. Mr. BARSEGOV said he thought that paragraph (6) should refer more specifically to the role of the Security Council and should even state that courts would have to take account of any findings by the Security Council.

63. Mr. McCAFFREY proposed that a sentence along the lines of one contained in paragraph (3) of the commentary to article 12[1] should be added at the end of paragraph (6). It would read: "These members raised the question whether a tribunal would be free to consider allegations of the crime of aggression in the absence of any consideration or finding by the Security Council."

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

64. Mr. YANKOV proposed that, in order to bring the wording of the last sentence into line with that of the Charter of the United Nations, the word "characterizing" should be replaced by "determining".

65. Mr. McCAFFREY proposed that the words "A few members", in the first sentence, should be replaced by "Some members". He also proposed that the end of the last sentence should be amended to read: ". . . should play a part in determining whether the acts invoked constituted a threat of aggression".

It was so agreed.

66. Mr. OGISO proposed that the following new sentence should be added before the last sentence of paragraph (7): "Others expressed doubts whether objective decisions on the fact of a threat could be made under the circumstances in which the alleged threat had taken place, but the act of aggression had not taken place."

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraph (8)

67. Mr. McCAFFREY, Mr. BARSEGOV and Mr. YANKOV said that paragraph (8) was unnecessary and should be deleted.

It was so agreed.

The commentary to article 13, as amended, was approved.

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[1] *Yearbook . . . 1988*, vol. II (Part Two), pp. 72-73.

Commentary to article 14 (Intervention)

Paragraph (1)

68. Mr. CALERO RODRIGUES said that, since paragraph (1) related to important substantive issues, it should be drafted as carefully as possible. He proposed that the last sentence should be amended in order not to give the impression that the enumeration which was its main component was a restrictive list.

69. Mr. THIAM (Special Rapporteur) and Mr. BENNOUNA (Rapporteur) endorsed those comments.

70. After an exchange of views in which Mr. RAZAFINDRALAMBO and Mr. CALERO RODRIGUES took part, the CHAIRMAN suggested that the last sentence of paragraph (1) should be amended to read: "The second element of the definition is an enumeration of activities constituting intervention: fomenting [armed] subversive or terrorist activities, or organizing, assisting or financing such activities, or supplying arms for the purpose of such activities."

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

71. Mr. EIRIKSSON proposed that the third to sixth sentences, from the words "For international life . . ." to the words ". . . situation in which that State is involved", should be deleted.

72. Mr. McCAFFREY supported that proposal. With regard to the first sentence, which referred to the judgment of the ICJ in the *Nicaragua* case, he pointed out that the Commission had been guided mainly by the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[2] He therefore proposed that that sentence should be amended to read: "In formulating the above-mentioned definition, the Commission was guided by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and, with regard to the first element of that definition, it took account of the recent jurisprudence of the ICJ." A footnote to the latter reference would give the full title of the case in question.

73. He also thought that paragraph (5) of the commentary should come before paragraph (2).

74. Mr. THIAM (Special Rapporteur) said that he wanted reference to be made to the *Nicaragua* case, which had been discussed at some length in his previous, sixth report (A/CN.4/411).

75. Mr. CALERO RODRIGUES said that, if the middle part of paragraph (2) were deleted, it would be necessary to amend what immediately followed, and in particular the words "on the other hand" in the seventh sentence. He agreed with Mr. McCaffrey that reference should be made to the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.

76. Mr. TOMUSCHAT said that he could agree to the deletion of the part of paragraph (2) referred to by Mr. Eiriksson. He could also agree that paragraph (5) should come before paragraph (2), and he would like reference to be made to the 1970 Declaration.

77. Mr. NJENGA said that he, too, agreed with those three proposals.

78. The CHAIRMAN said that, if there no objections, he would take it that the Commission agreed to delete the third to sixth sentences of paragraph (2), to refer in the first sentence to the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States as well as directly to the *Nicaragua* case, and to place paragraph (5) of the commentary before paragraph (2).

It was so agreed.

79. Mr. McCAFFREY proposed that the eighth and ninth sentences of the original paragraph (2) should be combined and amended along the following lines: "It is precisely in this sense that the ICJ said that a prohibited 'intervention' must be . . .".

It was so agreed.

80. Mr. CALERO RODRIGUES proposed that the word "Here", at the beginning of the second sentence, should be deleted.

It was so agreed.

81. Mr. TOMUSCHAT proposed that the end of the last sentence should be amended to read: ". . . the decisive criterion for wrongful intervention within the meaning of the present article".

Paragraph (2) (new paragraph (3)), as amended, was approved.

Paragraph (3) (new paragraph (4))

82. Mr. McCAFFREY said that he was somewhat reluctant to endorse paragraph (3) because the examples of intervention to which it referred had not been discussed in plenary.

83. Mr. CALERO RODRIGUES said that paragraph (3) reflected the discussion and that there was every justification for explaining the terms used in article 14.

84. Mr. THIAM (Special Rapporteur), supported by Mr. PAWLAK, said that the question had been discussed at length in the Drafting Committee and that he would like paragraph (3) to be retained.

Paragraph (3) (new paragraph (4)) was approved.

Paragraph (4) (new paragraph (5))

Paragraph (4) (new paragraph (5)) was approved.

Paragraph (5) (new paragraph (2))

85. Mr. CALERO RODRIGUES proposed that the word "may", in the second sentence, and the words "a particularly odious, serious and harmful form of assistance, namely", in the last sentence, should be deleted.

It was so agreed.

86. Mr. TOMUSCHAT proposed that, in the last sentence, the words "to draw attention to" should be replaced by "to focus on".

It was so agreed.

Paragraph (5) (new paragraph (2)), as amended, was approved.

[2] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

Paragraph (6)

87. Mr. TOMUSCHAT said that it would be necessary to review the tense of the verbs used in the third sentence. He also suggested that the phrase "although that word is used in the relevant text . . . referred to above", in the last sentence, should be deleted.

It was so agreed.

88. Mr. McCAFFREY said that, in view of the principle of the sovereign equality of States, the words "unequal States", at the end of the penultimate sentence, seemed rather inappropriate.

89. Mr. NJENGA suggested that those words be replaced by "States of unequal power".

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

90. Mr. McCAFFREY said he regretted that paragraph (7) did not explain the reason for the safeguard clause contained in paragraph 2 of article 14.

91. Mr. BARSEGOV said that, in his view, the explanations given in paragraph (7) were clear enough.

92. Mr. EIRIKSSON said he thought that, at the end of paragraph (7), a reference should be added to paragraph (4) of the commentary to article 15 (Colonial domination and other forms of alien domination) concerning the words "as enshrined in the Charter of the United Nations", which were also used in article 14.

It was so agreed.

Paragraph (7), as amended, was approved.

The commentary to article 14, as amended, was approved.

Commentary to article 15 (Colonial domination and other forms of alien domination)

Paragraph (1)

93. Mr. McCAFFREY recalled that, at the 2145th meeting (para. 55), a suggestion had been made to use the formula "Article . . . is modelled on" rather than the wording used at the beginning of paragraph (1), namely "Two . . . texts served as sources for . . .".

94. Mr. TOMUSCHAT said that reference should be made to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, which the General Assembly had adopted by consensus.

95. Mr. BENNOUNA (Rapporteur) said he agreed with Mr. McCaffrey that a draft article adopted on first reading, namely article 19 of part 1 of the draft articles on State responsibility, could not be placed on the same footing as the Declaration on the Granting of Independence to Colonial Countries and Peoples.[3] Article 19 could not serve as a "source" for article 15. Reference should also be made to General Assembly resolution 1541 (XV) of 15 December 1960 on the principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (*e*) of the Charter, as well as to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. He therefore proposed the following amended text for paragraph (1):

"For article 15, the Commission drew inspiration from General Assembly resolutions 1514 (XV) of 14 December 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, in particular paragraph 1 of that Declaration; 1541 (XV) of 15 December 1960 on the principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (*e*) of the Charter; and 2625 (XXV) of 24 October 1970, annexed to which is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The Commission also took into account its work on State responsibility, and in particular article 19, paragraph 3 (*b*), of part 1 of the draft articles on that topic."

96. Mr. THIAM (Special Rapporteur) said that he endorsed the amendment by the Rapporteur and would even suggest that the reference to article 19 could be deleted.

97. Mr. YANKOV said that he supported the text proposed by the Rapporteur, but thought that the reference to article 19 served a purpose because it explained the meaning of some of the terms used in article 15.

The Rapporteur's amendment was adopted.

Paragraph (1), as amended, was approved.

The meeting rose at 1.05 p.m.

2148th MEETING

Friday, 21 July 1989, at 3.05 p.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its forty-first session (*concluded*)

CHAPTER III. ***Draft Code of Crimes against the Peace and Security of Mankind*** (concluded) (A/CN.4/L.436 and Add.1-3)

C. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind (*concluded*) (A/CN.4/L.436/Add.3)

SUBSECTION 2 (Texts of draft articles 13, 14 and 15, with commentaries thereto, provisionally adopted by the Commission at its forty-first session) (*concluded*)

[3] General Assembly resolution 1514 (XV) of 14 December 1960.

Commentary to article 15 (Colonial domination and other forms of alien domination) (*concluded*)

Paragraph (2)

1. Mr. BENNOUNA (Rapporteur) proposed, in response to a point raised by Mr. BARBOZA, that the following sentence should be added to paragraph (2): "The expression 'by force' means the utilization of military coercion or of the threat of such coercion."

Paragraph (2) was approved.

Paragraph (3)

2. Mr. BARSEGOV said that the interpretation given to the phrase "any other form of alien domination", as used in article 15, was too narrow. It was intended to refer to much more than just "new forms of colonialism". He would therefore suggest that the words "or any other form of colonial exploitation" be inserted after the word "neo-colonialism" in the first sentence of paragraph (3).

3. Mr. THIAM (Special Rapporteur) said that he endorsed the proposal made by Mr. Barsegov.

4. Mr. McCAFFREY said he had been under the impression that the Drafting Committee had rejected the idea of including any reference to new forms of colonialism or neo-colonialism, because of the indeterminate nature of those concepts. The last sentence of paragraph (3) left the door wide open to characterizing almost anything as alien domination—cutting off economic aid, for example. He also thought it had been decided that the *nullum crimen, nulla poena sine lege* principle was to be applied, and that only the most serious crimes would be dealt with in the code. He would favour the deletion of paragraph (3) in its entirety.

5. Mr. TOMUSCHAT agreed that paragraph (3) should be deleted. He, too, recalled that the Drafting Committee had rejected a broad interpretation of article 15 and that it had determined that neo-colonialism was not a term of art and that the article should focus on foreign occupation.

6. Mr. DÍAZ GONZÁLEZ said that he could not agree to the deletion of paragraph (3). There was no question that colonialism and neo-colonialism still existed, and that those phenomena were grave crimes.

7. Mr. EIRIKSSON said that he would be able to accept deletion of some, but not all, of the material in paragraph (3). The explanation that the phrase "alien domination" was meant to be a shorthand expression for the phrase "subjection of peoples to alien subjugation, domination and exploitation" used in paragraph 1 of General Assembly resolution 1514 (XV), and that it included the phenomenon of foreign occupation, was useful and should be retained.

8. Mr. BENNOUNA (Rapporteur) said that, although neo-colonialism did still exist, it was not a technical legal term and therefore should not be used in the commentary to article 15. He also had the impression that two entirely separate issues were being mixed together in paragraph (3): forms of colonial domination, and permanent sovereignty over natural resources. He would suggest that the part of the first sentence after the words "any other form of alien domination" should be replaced by the phrase "refers to foreign occupation of the territory of a State and any other infringement of the right of each State freely to choose its political, economic and social system".

9. Mr. THIAM (Special Rapporteur) said that he could not endorse the proposal made by the Rapporteur. Although the Drafting Committee had decided not to use the word "neo-colonialism" in the text of article 15, it had not necessarily ruled out using it in the commentary. Article 15 referred quite properly not only to alien domination, but also to the exploitation of natural resources contrary to the sovereign will of a people. Economic domination was one of the new forms of colonialism and that was exactly what the article referred to.

10. Mr. CALERO RODRIGUES said that he disagreed with the Special Rapporteur. Article 15 referred to alien domination that was contrary to the right of peoples to self-determination. The commentary failed to make that clear, however, and he was not convinced that the reference in paragraph (3) to General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources was relevant. Certainly, economic domination was to be deplored but, unless it was carried out in a way that was contrary to the right of peoples to self-determination, it should not be considered a crime under the code.

11. Mr. BARBOZA said that he endorsed the statements made by the Rapporteur and Mr. Calero Rodrigues. Acts should be considered crimes under article 15 only if they involved denial of the right to self-determination. A key concept of relevance to article 15, namely the notion of maintenance of domination by force, had not been defined in the commentary and the omission should be rectified.

12. Mr. ARANGIO-RUIZ said he agreed that neo-colonialism existed but that the term was not a technical, legal one. In drafting article 15 and the commentary, the Commission had to walk a tightrope between protecting the interests of the developing countries and creating obstacles to sorely needed international co-operation.

13. Mr. McCAFFREY said that his understanding of article 15 was exactly the same as that of Mr. Calero Rodrigues. He would suggest that the second part of the first sentence of paragraph (3) be deleted and that the first part be combined with the third sentence. The second sentence would then follow, and the fourth sentence would be deleted. The amended paragraph (3) would read:

> "The second part of the article, reading 'any other form of alien domination', is based on the formulation of paragraph 1 of General Assembly resolution 1514 (XV) mentioned above, which refers to 'The subjection of peoples to alien subjugation, domination and exploitation': article 15 uses a shorter form of words which does not reduce its scope. It was also understood in the Commission that the words 'alien domination' included the phenomenon of foreign occupation."

14. Mr. BARSEGOV said that paragraph (2) of the commentary covered the subject of colonialism and, if a reference to neo-colonialism was to be introduced anywhere, it should be there. Paragraph (3), on the other hand, referred to something entirely different: "any other form of alien domination", in other words phenomena that were not colonialism *per se* but constituted violations of the right to self-determination. He would therefore suggest that the beginning of paragraph (3) be amended to read: "The second part of the article, reading 'any other form of alien domination', refers to all known forms of alien domination that violate the right of peoples to self-determination." The

passage cited by Mr. Eiriksson, namely the reference to alien subjugation, domination and exploitation, could then be incorporated. The last sentence of the paragraph, taken from the last sentence as it now stood, would read: "Moreover, this formulation has the advantage of taking into account all forms of domination and precludes possible restrictive interpretations."

15. Mr. THIAM (Special Rapporteur) said that economic domination was a modern reality and should be mentioned in the commentary.

16. Mr. BEESLEY said that the problem with economic domination was similar to that of the definition of aggression: it was quite clear what it was in practice, but it was difficult to define it at the abstract level, because it was a shifting concept.

17. Mr. CALERO RODRIGUES suggested that the Rapporteur should draft a new text for paragraph (3), incorporating the points raised during the discussion.

It was so agreed.

18. Mr. BENNOUNA (Rapporteur) proposed that paragraph (3) should be reworded as follows:

> "The second part of the article, reading 'any other form of alien domination', is directly inspired by paragraph 1 of General Assembly resolution 1514 (XV). It refers to any foreign occupation and any deprival of the right of every people to choose freely its political, economic and social system, in violation of the right of peoples to self-determination as enshrined in the Charter of the United Nations. Some members considered that this included the exploitation of the natural resources and wealth of peoples in violation of General Assembly resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources."

19. Mr. EIRIKSSON said that the original reference to alien domination was important and could be incorporated in the text proposed by the Rapporteur without difficulty. Moreover, the phrase "any deprival of the right of every people to choose freely its political, economic and social system" was unnecessary and would make the paragraph unduly cumbersome. It would suffice to refer to the right of peoples to self-determination.

20. Mr. BARSEGOV proposed that the words "annexation, enslavement and all other forms of domination known to international law" should be added after the words "foreign occupation" in the second sentence of the text proposed by the Rapporteur.

21. Mr. YANKOV, agreeing with Mr. Eiriksson and Mr. Barsegov, proposed that the words "or alien domination" should be added after the word "occupation".

22. Mr. CALERO RODRIGUES said that, while he would have no objection to Mr. Barsegov's proposal, he did not think it would introduce any new element, since annexation was covered by the phrase "any deprival of the right of every people to choose freely its political, economic and social system", as well as by other crimes under the code, including aggression.

23. Mr. McCAFFREY said that, while he, too, did not object to adding the word "annexation", he would point out that it was already covered by paragraph 4 (*a*) of article 12 (Aggression), provisionally adopted by the Commission at its previous session,[1] which referred to military occupation and annexation.

24. Mr. BARSEGOV said he none the less thought that it was important to refer to annexation in the commentary to article 15.

25. Mr. PAWLAK proposed that the second sentence of the text proposed by the Rapporteur should include a reference to new forms of colonialism.

26. Mr. THIAM (Special Rapporteur) said that he saw no reason why a reference to new forms of colonialism should not be included in the commentary, as opposed to the text of the article itself.

27. Mr. CALERO RODRIGUES said that it might be useful to explain why a shortened form of the phrase "subjection of peoples to alien subjugation, domination and exploitation" had been used, particularly since the amended text proposed for paragraph (3) stated at the outset that the second part of article 15 was based mainly on General Assembly resolution 1514 (XV).

28. Mr. McCAFFREY reiterated that he would have the strongest objections to retaining the last sentence of the original paragraph (3), and in particular the phrase "whatever form they may take, and precludes possible restrictive interpretations".

29. The CHAIRMAN suggested that the Commission should approve paragraph (3) as amended by the Rapporteur (para. 18 above), with further amendments to take account of the views expressed by Mr. Barsegov, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. McCaffrey and Mr. Pawlak.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

30. Mr. EIRIKSSON suggested that the words "It was also pointed out", at the beginning of the last sentence, should be replaced by "The view was expressed".

It was so agreed.

31. Mr. TOMUSCHAT said that he took issue with the entire paragraph, which implied that the right to self-determination had been a legal principle even before the Charter of the United Nations had come into force: that was simply not true, although he would agree that it had been a political principle, and had been since the French Revolution.

32. Mr. DÍAZ GONZÁLEZ said that, as far as he was concerned, there was no question whatsoever that the right to self-determination was an inalienable right of peoples.

33. Mr. BEESLEY suggested that the words "had come into being with", in the first sentence, should be replaced by "had not existed prior to".

It was so agreed.

34. Mr. EIRIKSSON, supported by Mr. McCAFFREY, said that the second sentence was redundant and should be deleted.

35. Mr. PAWLAK said that he opposed that proposal: even if the second sentence repeated what was stated in the first, namely that the right to self-determination had existed

[1] *Yearbook ... 1988*, vol. II (Part Two), p. 72.

before the adoption of the Charter, there was no harm in repeating such an important historical fact.

36. Mr. YANKOV said that there seemed to be a certain amount of confusion between the legal principle or tenet of the right of peoples to self-determination, which had long been acknowledged, and the objective right of peoples to self-determination, which had been recognized as a rule of law only at a certain point in political and social development. Those involved in the work on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[2] knew that some Western countries, particularly members of NATO, had taken the view that self-determination was not a legal principle. Similarly, General Assembly resolution 1514 (XV), containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, had been considered by those countries as not being in line with international law, for it would reveal colonial Powers to have been violating the law. No one could question the inherent right of peoples to self-determination: the problem was that that right had not been universally recognized as a legal rule at the time of the Charter, and had still not been acknowledged as such everywhere in the world.

37. Mr. BEESLEY said that, while he did not disagree with Mr. Yankov as to the principles outlined, he certainly did disagree with regard to the examples cited in support of those principles.

38. Mr. FRANCIS said that the right to self-determination was unquestionably a legal right.

39. Mr. ARANGIO-RUIZ, associating himself with Mr. Yankov's remarks, said that some countries had undoubtedly been uncertain about their positions throughout the negotiations with respect to General Assembly resolution 2625 (XXV).

40. Mr. CALERO RODRIGUES observed that the Commission was not required to deny or affirm the right to self-determination but simply to explain what the expression "as enshrined in the Charter of the United Nations" meant in the context of article 15.

41. Mr. EIRIKSSON said that the last part of the second sentence of paragraph (4), which implied a legal interpretation of the Charter, was unnecessary.

42. The CHAIRMAN suggested, in the light of the comments made, that the second sentence of paragraph (4) should be amended to read: "Several members stressed that this right had existed before the adoption of the Charter, which had simply recognized and confirmed it."

It was so agreed.

Paragraph (4), as amended, was approved.

The commentary to article 15, as amended, was approved.

43. Mr. THIAM (Special Rapporteur) proposed that, in order to establish a link between the crime committed and the author of the crime, a footnote relating to articles 13, 14 and 15 should be added at the end of the heading of subsection 2, reading:

"Unlike what was done in paragraph 1 of article 12 (Aggression), articles 13, 14 and 15 are, at this stage, confined to the definition of the acts constituting the crimes set forth in the articles. The question of the attribution of those crimes to individuals will be dealt with later in the framework of a general provision."

It was so agreed.

Section C.2, as amended, was adopted.

Chapter III of the draft report, as amended, was adopted.

CHAPTER IV. ***State responsibility*** (A/CN.4/L.437)

A. Introduction

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 8 to 28

Paragraphs 8 to 28 were adopted with minor drafting changes.

Paragraph 29

44. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in the first sentence, the words "qualified as crimes" should be inserted between the words "wrongful acts" and "could be dealt with", and the words "lists of wrongful acts" should be replaced by "lists of crimes". The second sentence should be deleted.

Paragraph 29, as amended, was adopted.

Paragraph 30

Paragraph 30 was adopted.

Paragraph 31

45. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the word "or", between the words "wrongful act" and "cessation" in the first sentence, should be replaced by "as", and that the words "rules concerning the" should be inserted before the word "procedural" in the second sentence.

Paragraph 31, as amended, was adopted.

Paragraph 32

46. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the word "only", between the words "Part Three" and "to the rules" in the first sentence, should be deleted, as should the words "there were" and "which" in the second sentence.

Paragraph 32, as amended, was adopted.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

47. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the word "rightly", in the second sentence, should be deleted, and the word "This", at the beginning of the fifth sentence, should be replaced by "It was pointed out by this member that such an".

Paragraph 34, as amended, was adopted.

Paragraph 35

48. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the words "elementary common sense suggested", in the second sentence, should be replaced by "he believed".

Paragraph 35, as amended, was adopted.

[2] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

Paragraphs 36 to 40

Paragraphs 36 to 40 were adopted.

Paragraph 41

49. Mr. BARBOZA proposed that the part of the paragraph following the second sentence should be replaced by the following text:

"Considering cessation as compliance with the primary obligation would blur the distinction, which had first been used by the Commission in the present topic, between primary and secondary rules, and would base the consequences of the violation on two different grounds. It would also be wrong because, even if cessation were intended to restore the situation prevailing before the breach of the obligation, it required from the author State a conduct different from that imposed by the original obligation. Even if that conduct were the same, it would have a completely different meaning. Cessation was, then, a legal consequence of the breach of the primary obligation, and as such it seemed to be one of the components of reparation."

50. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he accepted that amendment, with some reservations.

Mr. Barboza's amendment was adopted.

Paragraph 41, as amended, was adopted.

Paragraphs 42 to 48

Paragraphs 42 to 48 were adopted.

Paragraph 49

51. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the words "It was noted that" should be inserted at the beginning of the last sentence.

Paragraph 49, as amended, was adopted.

Paragraph 50

Paragraph 50 was adopted.

Paragraph 51

52. Mr. ARANGIO-RUIZ (Special Rapporteur), referring to the first sentence, said that the word "situation" should be replaced by "obligation" and the word "formal" should be deleted. The positions of the second and third sentences should be reversed.

Paragraph 51, as amended, was adopted.

Paragraphs 52 to 58

Paragraphs 52 to 58 were adopted.

Paragraph 59

53. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the two bracketed phrases in the penultimate sentence should be deleted.

Paragraph 59, as amended, was adopted.

Paragraphs 60 and 61

Paragraphs 60 and 61 were adopted with minor drafting changes.

Paragraph 62

54. Mr. BARBOZA proposed that the following text should be inserted after the third sentence:

"One member expressed the view that restitution in kind and cessation should be carefully separated. The notion of cessation being absorbed by, or telescoped into, restitution in kind should be expressly rejected, even in the extreme case where they happened at the same time. Accordingly an act might cease without restitution in kind occurring, and where it did occur both concepts were separable and should be separated."

It was so agreed.

Paragraph 62, as amended, was adopted.

Paragraphs 63 to 71

Paragraphs 63 to 71 were adopted with minor drafting changes.

Paragraph 72

55. Mr. PAWLAK remarked that the expression "the environment within which aliens had to live", in the third sentence, called for some clarification.

56. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that the word "social" should be inserted before the word "environment" in that expression. In addition, the words "In the view of this member" should be inserted at the beginning of the third sentence.

It was so agreed.

Paragraph 72, as amended, was adopted.

Paragraph 73

Paragraph 73 was adopted with a minor drafting change.

Paragraph 74

57. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the last part of the first sentence should be amended to read: ". . . although it might be possible to take account of the level of economic development of the offending State".

Paragraph 74, as amended, was adopted.

Paragraphs 75 to 81

Paragraphs 75 to 81 were adopted.

Paragraph 82

58. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the word "rightly", at the end of the first sentence, should be deleted.

Paragraph 82, as amended, was adopted.

Paragraph 83

59. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the word "still" should be inserted before the words "remained the issues", in the second sentence. The sixth sentence should be deleted.

Paragraph 83, as amended, was adopted.

Paragraphs 84 to 86

Paragraphs 84 to 86 were adopted.

Section B, as amended, was adopted.

C. Texts of the draft articles of part 2 provisionally adopted so far by the Commission

Paragraph 87

Paragraph 87 was adopted.

Section C was adopted.

60. Mr. EIRIKSSON asked whether the Special Rapporteur had any specific questions to address to the Sixth Committee in accordance with paragraph 5 (*c*) of General Assembly resolution 43/169 of 9 December 1988.

61. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had given the matter much thought and had come to the conclusion that it would be more appropriate to formulate specific questions at the end of the Commission's next session, at which time his second report on the topic (A/CN.4/425 and Add.1) would have been considered.

62. Mr. CALERO RODRIGUES, noting that the Commission had complied with the General Assembly's request in connection with only one topic, namely the law of the non-navigational uses of international watercourses, said that he did not know how the General Assembly would receive such a response.

63. The CHAIRMAN recalled that all the special rapporteurs had been asked to formulate specific questions to be addressed to the Sixth Committee, without, however, a great deal of success.

Chapter IV of the draft report, as amended, was adopted.

CHAPTER VIII. ***Relations between States and international organizations (second part of the topic)*** (A/CN.4/L.441)

64. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) indicated some corrections to the French text of paragraphs 25, 26, 34 and 35.

A. Introduction

Paragraphs 1 to 17

Paragraphs 1 to 17 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 18 to 21

Paragraphs 18 to 21 were adopted.

Paragraph 22

65. Mr. YANKOV suggested that the word "ecological" should be inserted in an appropriate place in the list of problems in the last sentence.

It was so agreed.

66. Mr. BENNOUNA (Rapporteur) said that the last sentence of the French text should be brought into line with the English.

Paragraph 22, as amended, was adopted.

Paragraphs 23 to 28

Paragraphs 23 to 28 were adopted.

Paragraph 29

67. Mr. BENNOUNA (Rapporteur) said that a footnote should be added giving the particulars of the advisory opinion of the ICJ of 11 April 1949.

Paragraph 29, as amended, was adopted.

Paragraphs 30 to 40

Paragraphs 30 to 40 were adopted.

Section B, as amended, was adopted.

Chapter VIII of the draft report, as amended, was adopted.

68. In reply to a point raised by Mr. NJENGA, the CHAIRMAN said that, in introducing the Commission's report in the Sixth Committee, he would emphasize that chapter VIII was intended for information only, the Commission having been unable to consider the topic at its forty-first session due to lack of time.

The draft report of the Commission on the work of its forty-first session as a whole, as amended, was adopted.

Closure of the session

69. After an exchange of congratulations and thanks, the CHAIRMAN declared the forty-first session of the International Law Commission closed.

The meeting rose at 6.40 p.m.

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