

Document:-  
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**Summary record of the 2179th meeting**

Topic:  
**Other topics**

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## 2179th MEETING

Friday, 22 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

*Present:* 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. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

### Visit by a former member of the Commission

1. The CHAIRMAN, speaking on behalf of the Commission, welcomed Sir Francis Vallat, a former member of the Commission, who had made an invaluable contribution to its work in the past.
2. Sir Francis VALLAT congratulated the members of the Bureau on their election, and especially the Chairman, Mr. Shi. He noted that, since being appointed Special Rapporteur, Mr. Barboza had made considerable progress in his study of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Because he had himself devoted his entire life to teaching, he had special pleasure in noting the presence at the current meeting of the participants in the International Law Seminar. He shared the deep regret of the members of the Commission at the death of Mr. Paul Reuter and was sure that Mr. Pellet would prove a worthy successor.

**Relations between States and international organizations (second part of the topic) (continued)**  
(A/CN.4/401,<sup>1</sup> A/CN.4/424,<sup>2</sup> A/CN.4/L.383 and Add.1-3,<sup>3</sup> A/CN.4/L.443, sect. G, ST/LEG/17)

[Agenda item 8]

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

#### ARTICLES 1 TO 11<sup>4</sup> (continued)

3. Mr. BEESLEY said that he would make only a few general observations on the broad outlines of the draft articles under consideration. Although members of the Commission had agreed to avoid theoretical discussions, they had to give the Special Rapporteur some idea of the basic approach they would like him to adopt. Otherwise, they would simply be making drafting points and would not, in his view, be fulfilling their mandate.
4. It had been asked whether the Commission should simply codify the existing law, as contained, for

instance, in headquarters agreements and in the 1946 Convention on the Privileges and Immunities of the United Nations, or try to develop international law by improving the rules in force, or do both. In his view, the question should not be put in those terms. Since an established law in the form of conventions already existed and could almost be called a “contractual” law, he thought that the Commission should confine itself to enunciating residual rules. In that connection, he referred to the formula used by the Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses in draft article 24 as submitted in his fifth report:<sup>5</sup> “In the absence of agreement to the contrary...”. He suggested that the Commission should draft rules which would be applicable except where the parties had agreed otherwise. That approach might seem timid, in view of the possibility that might exist to engage in the progressive development of international law, but any attempt at development along those lines was bound to create more problems than it would solve. Like other speakers before him, he therefore suggested that the Commission should confine itself to “filling the gaps”.

5. Explaining his position, he noted, for instance, that the concept of the “legal personality” of international organizations was still relatively new in international law and, for some people, still a controversial matter. Even if it was now generally agreed that certain international organizations, such as those of the United Nations system, had or should have international personality, that did not answer the question as to the nature and extent of that personality. It must be understood that international organizations were in fact the “creatures” of sovereign States.

6. It might well be that international organizations had a life of their own, but their existence ultimately depended on the will of the States which had established them and that was a fact which must not be forgotten. It was particularly true in the case of host States, which would not be willing to grant international organizations more extensive privileges and immunities than those provided for in headquarters agreements. It must also not be forgotten that, in the mind of courts and perhaps in the mind of Governments as well, there was a link between the privileges and immunities enjoyed by representatives to international organizations and the privileges and immunities granted to the officials of those organizations and to the organizations themselves. He noted that States were tending to adopt an increasingly conservative attitude towards the privileges and immunities granted to representatives.

7. There seemed to be no basic disagreement on the idea that international organizations of a universal character should be attributed autonomous legal personality. The functional approach, which had very properly been suggested by the Special Rapporteur, also seemed to be acceptable to everyone. He therefore suggested that the draft should refer simply to the

<sup>1</sup> Reproduced in *Yearbook* ... 1986, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* ... 1989, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* ... 1985, vol. II (Part One)/Add.1.

<sup>4</sup> For the texts, see 2176th meeting, para. 1.

<sup>5</sup> *Yearbook* ... 1989, vol. II (Part One), p. 123, document A/CN.4/421 and Add.1 and 2.

privileges and immunities required by an organization in order to discharge specific functions. In his view, however, it would not be desirable to draw any conclusions as to the existence of some sort of "supranational" body. He would be the first to endorse the purposes and objectives of the United Nations, but, as a realist, he had to admit that international organizations could do only what States allowed them to do. Instead of trying to attribute a particular power to them it would be better simply to take account of their "functional needs".

8. Referring to Mr. Barsegov's comment (2178th meeting) on the "supranational" entities which might be set up, he said that Mr. Barsegov might have been thinking of a body established in accordance with the provisions of the 1982 United Nations Convention on the Law of the Sea. However, no institution of that kind had yet come into being. The attempt to set up a supranational body for environmental matters by means of a joint declaration had not been successful because States had not been ready to take such a step. The Commission should therefore avoid endorsing a "supranational" approach and should be careful not to refer to supranationality either in the draft articles or in the commentaries; if it did so, it would be going beyond the current thinking of the international community. Moreover, with regard to the functional approach, the Commission should not try to be exhaustive. That would be tackling the problem the wrong way round and it would then be better to opt for the sectoral approach suggested by Mr. Mahiou (2177th meeting).

9. In conclusion, he did not think that the Commission had to prepare a draft which would tend to give international organizations some kind of sovereignty. Rather, it should try to draft a useful text which would propose, in addition to the treaty law in force, residual rules based on common sense. With particular reference to draft article 5, he would prefer that, instead of referring to the legal personality of international organizations, the Commission should simply draw up a list of the legal capacities which should be attributed to such organizations to enable them to discharge their functions, taking due account of the provisions of draft articles 4 and 11. It was that functional aspect which should be emphasized, with a maximum of precision, for the benefit of the Sixth Committee of the General Assembly.

10. Mr. THIAM said that the Special Rapporteur had been right to adopt a pragmatic approach in his fourth report (A/CN.4/424) and to follow the facts closely. International organizations were working tools which States required to achieve specific objectives. Although the States that created them thought they could give them a "soul", they were above all instruments. International organizations maintained ambiguous relations with States, which, while needing their services, were wary of their dynamism and tried to keep them in check. Most international organizations were under very close surveillance. Thus, leaving aside the United Nations, most of the functions exercised by the heads of the secretariats of international organizations were administrative. Concretely speaking, such close surveillance was reflected in the fact that States themselves

sat in international organizations and monitored and limited their functioning. That régime was very strict. If the head of the secretariat of an international organization exceeded his authority, he soon found out that it could have painful consequences.

11. With regard to the functional needs of international organizations, matters were equally clear: if an international organization needed greater powers, it was up to States to define them, and the Special Rapporteur had done well in the draft to limit the legal capacity of international organizations to contracting, acquiring property and instituting legal proceedings (art. 5). The Special Rapporteur had also devoted an article to capacity to conclude treaties (art. 6), but he (Mr. Thiam) was not sure whether international organizations could or should have such capacity. The head of the secretariat of one organization, having signed a simple co-operation agreement, had been forced to resign in the face of the reactions which that initiative had provoked. States delegated to international organizations only strictly defined subjects that did not affect their sovereignty.

12. He recognized that it was normal for international organizations to have privileges and immunities in keeping with the requirements of their functions. However, although immunity from legal process seemed to be accepted, he wondered whether that meant allowing it in all cases to lead to a denial of justice. The question was worth asking. He agreed on that point with those members of the Commission who had stressed the danger that immunity from legal process would represent if it led to a kind of impunity for international organizations. In the event of legal proceedings between an individual and an international organization, if the latter claimed immunity, it did not mean that the person concerned was deprived of a remedy. He could lodge a complaint with the authorities of the country, in particular the Minister for Foreign Affairs, who would attempt to reconcile the parties concerned.

13. He asked the Special Rapporteur to provide clarification concerning immunity in respect of measures of execution. It was stated in the report (A/CN.4/424, para. 58) that international organizations could not waive that immunity. If an international organization wished to do so, he did not see why it should be refused that right. In that connection, he referred members to article 32, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, which provided that the accrediting State might, in a separate waiver, waive immunity in respect of measures of execution of a judgment.

14. Mr. AL-QAYSI said that, in considering the present topic, a number of basic points had to be borne in mind, as the Special Rapporteur had done in a clear and succinct fourth report (A/CN.4/424) which attested to his mastery of the subject-matter.

15. First, the establishment of an international organization required a constituent instrument which determined the legal personality of the organization as an entity distinct from the States that established it. Secondly, in order to function in an autonomous, inde-

pendent and efficient manner, international organizations must have a set of privileges, immunities and facilities, the scope of which must, however, be defined by the application of a sole criterion, namely functional need. Thirdly, a variety of international organizations meant a variety of functional needs, and it was therefore difficult to draft a general régime for privileges, immunities and facilities that automatically applied to all organizations. That was why, in practice, those questions were settled case by case, in the organizations' constituent instruments, in conventions or in headquarters agreements.

16. If those premises were accepted, as they appeared to be, it then had to be determined what the objective of the work being done on the topic could or should be. The Commission's task was the progressive development and codification of international law. In the case under consideration, however, it must be noted that, from the point of view of codification, the conventions and agreements that governed the functioning of international organizations were very numerous and that, on the whole, international organizations seemed to be satisfied with them. For there to be a reason to develop the law, there must, in practice, be *lacunae*; but those had not been identified. He agreed with Mr. Beesley concerning the "contractual" law that governed international organizations. Perhaps the Commission should simply confine itself to establishing a régime focusing on the aspects of relations between States and international organizations which, from the point of view of the latter, gave rise to problems in practice. It must avoid the excessive generalizations that would occur if it set out to define a régime that was common to all international organizations of a universal character.

17. Although international organizations had on occasion experienced problems, in the vast majority of cases they had succeeded in solving them with their member States or the host Governments pragmatically and realistically. Those problems that had not been solved were not necessarily of the kind that could be dealt with in a convention such as the one the Commission was contemplating. In that connection, Mr. Solari Tudela (2178th meeting) had referred to the example of the Security Council moving from New York to Geneva to enable Yasser Arafat to speak in that body. At issue in that case had been the way in which the host country interpreted its obligations under the headquarters agreement with the United Nations. Before attempting to settle that type of problem in a convention, it was important to consider to what extent it was possible to impose upon a host Government an obligation which it considered contrary to its political interests.

18. He differed perhaps with some members in believing that the Commission should not give the General Assembly the impression that it wished to discontinue its consideration of the topic: if it did so, it might also give the impression that it had not fulfilled its mandate, and that would be damaging to its credibility. Nevertheless, the Commission was bound to indicate to the General Assembly how the majority of its members viewed the work on the topic. In his opinion, such

work must be realistic, it must be based on what international organizations regarded as their needs and it must consist of drafting a régime relating to problems that had not yet been regulated, perhaps in the form of residual rules, as suggested by Mr. Beesley, or, as proposed by other members, in the form of a framework agreement. In other words, it was important to accept a realistic limitation of the scope of the topic on the basis of the actual needs of international organizations and to avoid generalizing too much.

19. Mr. EIRIKSSON said that he could adopt, virtually word for word, as his own the general comments made at the previous meeting by Mr. McCaffrey and Mr. Bennouna and, except for two points, all the comments made by Mr. McCaffrey on individual articles. He, too, wondered where the work on the subject would take the Commission. It appeared that the Commission would recommend that the régime for existing organizations should remain intact; it was also probable that the status of future organizations would be tailored to their functions and purposes and he therefore doubted whether it would be possible in the abstract to provide guidance in the draft articles.

20. With regard to the draft articles themselves, he said that he accepted the general definitions contained in article 1, which should be entitled "Use of terms".

21. Regarding paragraph 1 of draft article 2, he was not opposed to confining the Commission's work for the time being to international organizations of a universal character. Unlike Mr. McCaffrey, however, he believed that the phrase "when the latter have accepted them" must be deleted. To retain those words would call into question the status of articles adopted without such a phrase. As for paragraph 2, he repeated his standard opposition to that type of non-prejudicial clause, even though, in respect of that particular one, he was perhaps 20 years too late. He was convinced that paragraph 3 should be deleted.

22. With regard to draft article 3, the Commission should come back to the relationship between the present articles and the rules of international organizations after it had completed its work.

23. Although the relationship between the present articles and other existing agreements—dealt with in subparagraph (a) of draft article 4—was clear, the Commission should likewise come back to that question at the conclusion of its work. The relationship with future agreements (subpara. (b)) should be left to treaty law. In that connection, he recalled the discussion which had taken place in the Commission at its previous session on article 32 of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier<sup>6</sup> and article 41 of the 1969 Vienna Convention on the Law of Treaties.

24. Turning to the articles on legal personality and privileges and immunities of international organizations, he referred to Mr. Pellet's analysis at the previous meeting and said that he belonged to the "func-

<sup>6</sup> For the text of article 32 adopted by the Commission on second reading at its forty-first session, and the commentary thereto, see *Yearbook* . . . 1989, vol. II (Part Two), pp. 46-47.

tional school". He had recently been involved in the establishment of a large, although not universal, international organization and in efforts within the Council of Europe to standardize questions of that nature. He had concluded that the term "functional" meant different things to different people, and that there was a complex interrelationship between the interests of States setting up an organization, the often independent interests of the organization itself and the interests of existing or potential host States. He was therefore not very optimistic that the Commission could break new ground in that area.

25. With regard to draft article 5, he had no objection to providing that international organizations enjoyed legal personality, but the references to international law and internal law should be deleted. The consequences of that normative provision should be determined by the needs of the organizations concerned, as stated in their constituent instruments. An organization might or might not have the capacity set out in subparagraphs (a), (b) and (c), or its capacity could comprise other elements. As worded, the article gave the impression that the list was exhaustive, but that was not the case. The current text of draft article 6, which was a revision of the provision submitted by the Special Rapporteur in his second report,<sup>7</sup> seemed to state the obvious and raised the question of its relationship with article 5. He was not completely in agreement with Mr. McCaffrey on those two articles and would propose the following wording:

"International organizations shall have legal personality and shall enjoy in the territories of their member States and in their relations with other international organizations such legal capacity as may be necessary to perform their functions and achieve their ends."

26. As for draft articles 7 to 11, he had nothing to add to what Mr. McCaffrey had said at the previous meeting, apart from suggesting that subparagraph (c) of article 10 should be relocated. He also did not quite see what the effect of article 11 was.

27. In conclusion, he echoed Mr. Calero Rodrigues (2177th meeting) in recognizing the difficult nature of the Special Rapporteur's task, but remained confident that the Special Rapporteur would be able to draw upon the views expressed in the Commission to find the right approach for further work on the topic.

28. Mr. BARSEGOV said that he had not wanted to speak earlier so as not to hold up the discussion, but he wished to point out that, contrary to what had been implied, he had not said in his statement (2178th meeting) that supranational organizations or bodies existed. He had simply noted that certain organizations had elements of supranationality. Soviet doctrine had always been behind Western doctrine with regard to supranationality and it was the developing countries that deserved credit for emerging new elements.

<sup>7</sup> *Yearbook* ... 1985, vol. II (Part One), p. 113, document A/CN.4/391 and Add. 1, para. 74.

**International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/384,<sup>8</sup> A/CN.4/423,<sup>9</sup> A/CN.4/428 and Add.1,<sup>10</sup> A/CN.4/L.443, sect. D)<sup>11</sup>**

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR

ARTICLES 1 TO 33

29. The CHAIRMAN invited the Special Rapporteur to introduce his sixth report on the topic (A/CN.4/428 and Add.1), as well as draft articles 1 to 33 contained therein, which read:<sup>12</sup>

#### 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 a risk of causing, transboundary harm throughout the process.

##### Article 2. Use of terms

For the purposes of the present articles:

(a) "Activities involving risk" means activities referred to in article 1, including those carried on directly by the State, which:

(i) involve the handling, storage, production, carriage, discharge or other similar operation of one or more dangerous substances;

(ii) use technologies that produce hazardous radiation; or

(iii) introduce into the environment dangerous genetically altered organisms and dangerous micro-organisms;

(b) "Dangerous substances" means substances which present a[n appreciable] [significant] risk of harm to persons, property [, the use or enjoyment of areas] or the environment, for example flammable and corrosive materials, explosives, oxidants, irritants, carcinogens, mutagens and toxic, ecotoxic and radiogenic substances such as those indicated in annex ... A substance may be considered dangerous only if it occurs in certain quantities or concentrations, or in relation to certain risks or situations in which it may occur, without prejudice to the provisions of subparagraph (a);

(c) "Dangerous genetically altered organisms" means organisms whose genetic material has been altered in a manner that does not occur naturally, by coupling or natural recombination, creating a risk to persons, property [, the use or enjoyment of areas] or the environment, such as those indicated in annex ...;

(d) "Dangerous micro-organisms" means micro-organisms which create a risk to persons, property [, the use or enjoyment of areas] or the environment, such as pathogens or organisms which produce toxins;

(e) "[Appreciable] [Significant] risk" means risk which presents either the low probability of causing very considerable [disastrous] harm or the higher than normal probability of causing minor, though [appreciable] [significant], transboundary harm;

(f) "Activities with harmful effects" means activities referred to in article 1 which cause transboundary harm in the course of their normal operation;

(g) "Transboundary harm" means the harm which arises as a physical consequence of the activities referred to in article 1 and which, in

<sup>8</sup> Reproduced in *Yearbook* ... 1985, vol. II (Part One)/Add.1.

<sup>9</sup> Reproduced in *Yearbook* ... 1989, vol. II (Part One).

<sup>10</sup> Reproduced in *Yearbook* ... 1990, vol. II (Part One).

<sup>11</sup> 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.

<sup>12</sup> The footnotes to some of the first nine articles, in which the Special Rapporteur suggested possible alternative texts for the benefit of the Drafting Committee, are omitted.

the territory or in [places] [areas] under the jurisdiction or control of another State, is [appreciably] [significantly] detrimental to persons, [objects] [property] [, the use or enjoyment of areas] or the environment. In the present articles, the expression always refers to [appreciable] [significant] harm. It includes the cost of preventive measures taken to contain or minimize the harmful transboundary effects of an activity referred to in article 1, as well as any further harm to which such measures may give rise;

(h) "[Appreciable] [Significant] harm" means harm which is greater than the mere nuisance or insignificant harm which is normally tolerated;

(i) "State of origin" means the State which exercises jurisdiction or control over an activity referred to in article 1;

(j) "Affected State" means the State under whose jurisdiction or control the transboundary harm arises;

(k) "Incident" means any sudden event or continuous process, or series of events having the same origin, which causes, or creates the risk of causing, transboundary harm;

(l) "Restorative measures" means appropriate and reasonable measures to restore or replace the natural resources which have been damaged or destroyed;

(m) "Preventive measures" means the measures referred to in article 8 and includes both measures to prevent the occurrence of an incident or harm and measures intended to contain or minimize the harmful effects of an incident once it has occurred;

(n) "States concerned" means the State or States of origin and the affected State or States.

#### *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*

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 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 [areas] under its jurisdiction or control.

#### *Article 8. Prevention*

States of origin shall take appropriate measures to prevent or minimize the risk of transboundary harm or, where necessary, to contain or minimize the harmful transboundary effects of the activities in question. 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.

#### *Article 10. Non-discrimination*

States Parties shall treat the effects of an activity arising in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. In particular, they shall apply the provisions of the present articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by activities referred to in article 1.

### CHAPTER III. PREVENTION

#### *Article 11. Assessment, notification and information*

1. If a State has reason to believe that an activity referred to in article 1 is being, or is about to be, carried on under its jurisdiction or control, it shall 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, it shall notify the State or States likely to be affected as soon as possible, providing them with available technical information in support of its finding. It may also inform them of the measures which it is attempting to take to prevent or minimize the risk of transboundary harm.

2. If the transboundary effect may extend to more than one State, or if the State of origin is unable to determine precisely which States will be affected as a result of the activity, an international organization with competence in that area shall also be notified, on the terms stated in paragraph 1.

#### *Article 12. Participation by the international organization*

Any international organization which intervenes shall participate in the manner stipulated in the relevant provisions of its statutes or rules, if the matter is regulated therein. If it is not, the organization shall use its good offices to foster co-operation between the parties, arrange joint or separate meetings with the State of origin and the affected States and respond to any requests which the parties may make of it to facilitate a solution of the issues that may arise. If it is in a position to do so, it shall provide technical assistance to any State which requests such assistance in relation to the matter which prompted its intervention.

#### *Article 13. Initiative by the presumed affected State*

If a State has serious reason to believe that an activity under the jurisdiction or control of another State is causing it harm within the meaning of article 2, subparagraph (g), or creating a[n appreciable] [significant] risk of causing it such harm, it may ask that State to comply with the provisions of article 11. The request shall be accompanied by a technical, documented explanation setting forth the reasons for such belief. If the activity is indeed found to be one of those referred to in article 1, the State of origin shall bear the costs incurred by the affected State.

#### *Article 14. Consultations*

The States concerned shall consult among themselves, in good faith and in a spirit of co-operation, in an attempt to establish a régime for the activity in question which takes into account the interests of all parties. At the initiative of any of those States, consultations may be held by means of joint meetings among all the States concerned.

#### *Article 15. Protection of national security or industrial secrets*

The State of origin shall not be bound by the provisions of article 11 to provide data and information which are vital to its national security or to the protection of its industrial secrets. Nevertheless, the State of origin shall co-operate in good faith with the other States concerned in providing any information which it is able to provide, depending on the circumstances.

#### *Article 16. Unilateral preventive measures*

If the activity in question proves to be an activity referred to in article 1, and until such time as agreement is reached on a legal régime for that activity among the States concerned, the State of origin shall take appropriate preventive measures as indicated in article 8, in particular appropriate legislative and administrative measures, including requiring prior authorization for the conduct of the activity and

encouraging the adoption of compulsory insurance or other financial safeguards to cover transboundary harm, as well as the application of the best available technology to ensure that the activity is conducted safely. If necessary, it shall take government action to counteract the effects of an incident which has already occurred and which presents an imminent and grave risk of causing transboundary harm.

#### *Article 17. Balance of interests*

In order to achieve an equitable balance of interests among the States concerned in relation to an activity referred to in article 1, those States may, in their consultations or negotiations, take into account the following factors:

- (a) the degree of probability of transboundary harm and its possible gravity and extent, and the likely incidence of cumulative effects of the activity in the affected States;
- (b) the existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;
- (c) the possibility of carrying on the activity in other places or by other means, or the availability of alternative activities;
- (d) the importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;
- (e) the economic viability of the activity in relation to possible means of prevention;
- (f) the physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm caused or to undertake alternative activities;
- (g) the standards of protection which the affected State applies to the same or comparable activities, and the standards applied in regional or international practice;
- (h) the benefits which the State of origin or the affected State derive from the activity;
- (i) the extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;
- (j) the willingness of the affected State to contribute to the costs of prevention or reparation of the harm;
- (k) the extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;
- (l) the extent to which assistance from international organizations is available to the State of origin;
- (m) the applicability of relevant principles and norms of international law.

#### *Article 18. Failure to comply with the foregoing obligations*

Failure on the part of the State of origin to comply with the foregoing obligations shall not constitute grounds for affected States to institute proceedings unless that is provided for in other international agreements in effect between the parties. If, in those circumstances, the activity causes [appreciable] [significant] transboundary harm which can be causally attributed to it, the State of origin may not invoke in its favour the provisions of article 23.

#### *Article 19. Absence of reply to the notification under article 11*

In the cases referred to in article 11, if the notifying State has provided information concerning the measures referred to therein, any State that does not reply to the notification within a period of six months shall be presumed to consider the measures satisfactory. This period may be extended, at the request of the State concerned, [for a reasonable period] [for a further six months]. States likely to be affected may ask for advice from any international organization that is able to give it.

#### *Article 20. Prohibition of the activity*

If an assessment of the activity shows that transboundary harm cannot be avoided or cannot be adequately compensated for, the State of origin shall refuse authorization for the activity unless the operator proposes less harmful alternatives.

### CHAPTER IV. LIABILITY

#### *Article 21. Obligation to negotiate*

If transboundary harm arises as a consequence of an activity referred to in article 1, the State or States of origin shall be bound to negotiate

with the affected State or States to determine the legal consequences of the harm, bearing in mind that the harm must, in principle, be fully compensated for.

#### *Article 22. Plurality of affected States*

Where more than one State is affected, an international organization with competence in the matter may intervene, if requested to do so by any of the States concerned, for the sole purpose of assisting the parties and fostering their co-operation. If the consultations referred to in article 14 have been held and if an international organization has participated in them, the same organization shall also participate in the present instance, if the harm occurs before agreement has been reached on a régime for the activity that caused the harm.

#### *Article 23. Reduction of compensation payable by the State of origin*

For claims made through the diplomatic channel, the affected State may agree, if that is reasonable, to a reduction in the payments for which the State of origin is liable if, owing to the nature of the activity and the circumstances of the case, it appears equitable to share certain costs among the States concerned [, for example if the State of origin has taken precautionary measures solely for the purpose of preventing transboundary harm and the activity is being carried on in both States, or if the State of origin can demonstrate that the affected State is benefiting without charge from the activity that caused the harm].

#### *Article 24. Harm to the environment and resulting harm to persons or property*

1. If the transboundary harm proves detrimental to the environment of the affected State, the State of origin shall bear the costs of any reasonable operation to restore, as far as possible, the conditions that existed prior to the occurrence of the harm. If it is impossible to restore those conditions in full, agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered.

2. If, as a consequence of the harm to the environment referred to in paragraph 1, there is also harm to persons or property in the affected State, payments by the State of origin shall also include compensation for such harm.

3. In the cases referred to in paragraphs 1 and 2, the provisions of article 23 may apply, provided that the claim is made through the diplomatic channel. In the case of claims brought through the domestic channel, the national law shall apply.

#### *Article 25. Plurality of States of origin*

In the cases referred to in articles 23 and 24, if there is more than one State of origin,

##### ALTERNATIVE A

they shall be jointly and severally liable for the resulting harm, without prejudice to any claims which they may bring among themselves for their proportionate share of liability.

##### ALTERNATIVE B

they shall be liable *vis-à-vis* the affected State in proportion to the harm which each one of them caused.

#### *Article 26. Exceptions*

1. There shall be no liability on the part of the State of origin or the operator, as the case may be:

(a) if the harm was directly due to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) if the harm was caused wholly by an act or omission of a third party done with intent to cause harm.

2. If the State of origin or the operator, as the case may be, prove that the harm resulted wholly or partially either from an act or omission done with intent to cause harm by the person who suffered the harm or from the negligence of that person, they may be exonerated wholly or partially from their liability to such person.

#### *Article 27. Limitation*

Proceedings in respect of liability under the present articles shall lapse after a period of [three] [five] years from the date on which the affected party learned, or could reasonably be expected to have learned, of the harm and of the identity of the State of origin or the operator, as the case may be. In no event shall proceedings be instituted once thirty years have elapsed since the date of the accident that caused the

harm. If the accident consisted of a series of occurrences, the thirty years shall start from the date of the last occurrence.

#### CHAPTER V. CIVIL LIABILITY

##### Article 28. Domestic channel

1. It is not necessary for all local legal remedies available to the affected State or to individuals or legal entities represented by that State to be exhausted prior to submitting a claim under the present articles to the State of origin for liability in the event of transboundary harm.

2. There is nothing in the present articles to prevent a State, or any individual or legal entity represented by that State that considers that it has been injured as a consequence of an activity referred to in article 1, from submitting a claim to the courts of the State of origin [and, in the case of article 29, paragraph 3, of the affected State]. In that case, however, the affected State may not use the diplomatic channel to claim for the same harm for which such claim has been made.

##### Article 29. Jurisdiction of national courts

1. States parties to the present articles shall, through their national legislation, give their courts jurisdiction to deal with the claims referred to in article 28 and shall also give affected States or individuals or legal entities access to their courts.

2. States Parties shall make provision in their domestic legal systems for remedies which permit prompt and adequate compensation or other reparation for transboundary harm caused by activities referred to in article 1 carried on under their jurisdiction or control.

[3. Except for the affected State, the other persons referred to in article 28 who consider that they have been injured may elect to institute proceedings either in the courts of the affected State or in those of the State of origin.]

##### Article 30. Application of national law

The court shall apply its national law in all matters of substance or procedure not specifically regulated by the present articles. The present articles and also the national law and legislation shall be applied without any discrimination whatsoever based on nationality, domicile or residence.

##### Article 31. Immunity from jurisdiction

States may not claim immunity from jurisdiction under national legislation or international law in respect of proceedings instituted under the preceding articles, except in respect of enforcement measures.

##### Article 32. Enforceability of the judgment

1. When a final judgment made by the competent court is enforceable under the laws applied by that court, it shall be recognized in the territory of any other Contracting Party, unless:

- (a) the judgment has been obtained fraudulently;
- (b) the respondent has not been given reasonable advance notice and an opportunity to present his case in fair conditions;
- (c) the judgment is contrary to the public policy of the State in which recognition is being sought, or is not in keeping with the basic norms of justice.

2. A judgment which is recognized to be in accordance with paragraph 1 shall be enforceable in any of the States Parties as soon as the formalities required by the Contracting Party in which enforcement is being sought have been met. No further review of the substance of the matter shall be permitted.

##### Article 33. Remittances

States Parties shall take the steps necessary to ensure that any monies due to the applicant in connection with proceedings in their courts arising from the preceding articles, and any monies he may receive in respect of insurance or reinsurance or other funds designed to cover the harm in question, may be freely remitted to him in the currency of the affected State or in that of the State of his habitual residence.

30. Mr. BARBOZA (Special Rapporteur) said that section A of the introduction to his sixth report (A/CN.4/428 and Add.1) summarized the situation regarding the first 10 articles of the draft submitted in

his fourth report,<sup>13</sup> which had been referred to the Drafting Committee at the Commission's fortieth session, in 1988.<sup>14</sup> In his fifth report (A/CN.4/423), he had submitted revised draft articles 1 to 9 to replace those original 10 articles, as well as new draft articles 10 to 17.<sup>15</sup> The revised articles 1 to 9 had been referred to the Drafting Committee at the forty-first session, in 1989.

31. In the sixth report, he was proposing some new ideas with respect to the first 10 articles, in particular the concept of "dangerous substances" in subparagraphs (a) to (d) of draft article 2, on the use of terms. If that concept was not accepted, subparagraphs (a) to (d) would be deleted and subparagraph (e) (formerly subparagraph (a) (ii)) would be given its previous wording. Other new ideas were the *ex post facto* preventive measures referred to in subparagraphs (g) (*in fine*) and (m) of draft article 2 and in draft article 8; and the definitions in article 2 of "appreciable" or "significant" harm (subpara. (h)), "incident" (subpara. (k)), "restorative measures" (subpara. (l)) and "States concerned" (subpara. (n)). He was also introducing a new principle, that of non-discrimination, which would be the subject of article 10 in the event of the concept of "participation" as dealt with in article 8 of the 1988 draft not being adopted as an independent principle.

32. Section B of the introduction dealt with another preliminary question: whether activities involving risk and activities with harmful effects should be treated in the same way in the same set of articles or whether they should be dealt with separately. That section was designed to meet the concerns expressed by some members of the Commission at the previous session.

33. Chapter I of the report dealt with activities involving risk. Some very important changes had been made in the provisions relating to such activities. For instance, section A of chapter I referred to a matter which the Commission had not yet discussed, namely the inclusion of a list of dangerous substances which would give some insight into the true nature of the risk of transboundary harm involved in an "activity involving risk". That was only a very tentative suggestion; it was introduced in response to objections raised on a number of occasions by members of the Commission and representatives in the Sixth Committee of the General Assembly with regard to the need for States to know the scope of the obligations they would be assuming under the future convention to which they might become parties. Their view was that the mere concept of "appreciable" or even "significant" risk was not enough to determine *a priori* the obligations incumbent on States of origin.

34. The objections to the idea of a list of activities were still valid. Such a list would be too specific for a framework agreement. However, if the general concept of "appreciable" or "significant" risk of harm involved

<sup>13</sup> *Yearbook* ... 1988, vol. II (Part One), p. 251, document A/CN.4/413.

<sup>14</sup> For the texts, see *Yearbook* ... 1988, vol. II (Part Two), p. 9, para. 22.

<sup>15</sup> For the texts, see *Yearbook* ... 1989, vol. II (Part Two), pp. 84 *et seq.*, paras. 311 and 322.



in an activity were based on the substances or technologies used during that activity, there would be some room for an assessment of the activity itself, as well as greater flexibility than with a mere list of activities. The new subparagraphs (a) to (d) of draft article 2 were no more than an initial sketch, an attempt to express the idea in legal terms. They would certainly require further elaboration, and the substances to be included in the list would have to be decided by experts.

35. Section B of chapter I dealt with the specific amendments that would be necessary in article 2 should the Commission decide to adopt the "list" method. During the Commission's debates, it had often been said that article 2 could lend itself to any additions or changes that the development of the topic might make necessary. For instance, the previous subparagraph (a) (ii) would become subparagraph (e), defining "appreciable" or "significant" risk.

36. Section C of chapter I contained some new material in the form of changes which, as a result of further consideration, should be made in the first 10 articles. The provisions in question had been incorporated in some recent conventions and reflected the latest trends in international treaty law. The concept of "harm" had been expanded by including the cost of measures taken in order to contain or minimize the harmful effects of activities involving risk or to prevent further harm, and by giving preference to restoration in the event of damage to the environment and allowing for monetary compensation only when restoration was impossible (art. 2 (f) and art. 24, para. 1).

37. Chapter II of the report dealt with the principles in chapter II of the draft, which were little affected by the introduction of the concept of dangerous substances and the list of substances. One of those principles was prevention (art. 8) and, as he had already pointed out, the concept of *ex post facto* preventive measures had been introduced. A new article 10 took the place of the article in the 1988 draft dealing with "participation", which the Commission had almost unanimously decided was already covered by the principle of "co-operation" (art. 7). The new draft article 10 introduced the principle of non-discrimination, which should, in his view, have a place in the draft.

38. Chapter III of the report related primarily to prevention. It referred in particular to the revised procedure (arts. 11-15); the preventive measures to be taken unilaterally by the State of origin pending the conclusion of an agreement (art. 16); the possible prohibition of an activity (art. 20); and the absence of any right of action in the event of failure to comply with the obligations laid down in chapter III of the draft (art. 18).

39. The new procedure followed, in simplified form, the main lines of the procedure proposed in the fifth report (A/CN.4/423). It could, of course, be rejected altogether, with the possible exception of paragraph 2 of draft article 11, on transboundary effects which might extend to more than one State. If the procedure were omitted altogether, however, the draft articles would cover only liability and would no longer cover

prevention, except perhaps through the principle laid down in draft article 8. The new procedure would foster agreement by States on régimes of responsibility for specific activities, include certain obligations which were well established in treaty law and encourage participation by affected States, thus making for better prevention through the co-operation of all parties concerned. The case of harm which might extend to more than one State was covered by draft article 12, which provided for intervention by an international organization with competence in the matter. In fact, that was already international practice, as he had illustrated in the fifth report. The former obligation to negotiate an agreement had been considerably softened; it was now merely an obligation to consult (art. 14).

40. With regard to unilateral preventive measures, he explained that, regardless of the stage reached in consultations, the State of origin must, if it knew or had the means of knowing that an activity referred to in article 1 was under way or about to start, take certain measures to prevent or minimize the risk of transboundary harm. Draft article 16 therefore expanded on the principle of prevention laid down in draft article 8.

41. Draft article 17 had been inspired by the concept of a "balance of interests". Because that concept served as the foundation for many other provisions, he had decided to bring together some of the interests which had a bearing on the activities referred to in article 1. The factors listed provided guidelines for consultations or negotiations among the States concerned. However, the placing of article 17 remained problematic.

42. Article 18 would perhaps be better placed at the end of chapter III of the draft, but the important point was that a breach by the State of origin of any of the obligations laid down in the chapter, which were on the whole obligations of prevention, did not give rise to any right of action for an affected State. That was in keeping with the schematic outline: there were no hard obligations until damage had occurred. In earlier debates, some members of the Commission had spoken in favour of that idea and he would very much like to know the views of the Commission on that important point. In fact, if the obligations in the matter of prevention were to give rise to a right of action for other States, the draft would also cover responsibility for wrongful acts, and that might be beyond the Commission's mandate.

43. The prohibition of an activity (art. 20) was a completely new concept, but it could not be ruled out as the possible outcome of the consultations proposed in the new procedure. The original Spanish text used the formula *debería rehusar*, while the English used the words "shall refuse", which were more compulsory. At any rate, the existence of article 18 made the matter somewhat academic.

44. Chapter IV of the draft, on liability, gave more specific content to the principle of reparation embodied in draft article 9. The obligation to negotiate (art. 21) was perhaps the most important feature of the entire chapter and he recalled the discussion of that question in the fifth report (A/CN.4/423, paras. 126-147). When the State of origin incurred costs from which other

States derived some benefit, the ideal solution was to share the costs. In other words, the criterion of equity in the matter of reparation for transboundary harm could be the restoration of the balance of interests. Since it was difficult to determine the exact amount of compensation, draft article 21 provided for the duty of the State of origin to negotiate the amount to be paid—or, in general, “the legal consequences of the harm”—with the affected State.

45. Draft article 23, on reduction of compensation payable by the State of origin, was intended to govern a particular case, which should likewise be a matter for negotiation.

46. Draft article 24 developed the idea of harm to the environment, distinguishing between damage caused to the environment of a State and damage caused indirectly to persons or property. The latter was to be compensated for in the usual way, while the former called for the restoration of the previous situation or, if that was not possible, for compensation in monetary or other terms.

47. The case of a plurality of States of origin was dealt with in draft article 25. Two alternative texts were proposed, according to whether liability was to be joint and several or proportionate.

48. Draft article 26 provided for exceptions to liability in certain cases involving, for instance, *force majeure* or an intentional act or omission by a third party. Draft article 27 dealt with limitation. Those were common clauses in conventions.

49. Chapter V of the draft regulated certain aspects of civil liability. It had been considered convenient to include such provisions because private-law remedies had always been available: an affected person and even an affected State could choose to resort to the courts of the State of origin to obtain redress. The affected State might, for many reasons, choose not to endorse the claims of its subjects, since there was no obligation for it to do so. Draft article 28 seemed necessary in that it guaranteed a solution in all cases.

50. Several degrees of regulation could be provided for, article 28 being the minimum. Taking matters further, certain obligations could be imposed on the States parties, such as the obligation to provide foreign residents with access to their courts (art. 29, para. 1). As no local remedies might be available, however, paragraph 2 of article 29 required States parties to establish such remedies. Naturally, the local State could not claim immunity from jurisdiction (art. 31); that applied particularly in the case covered by paragraph 3 of article 29, under which affected persons could institute proceedings before the courts of the State of origin. The courts would apply their national law (art. 30) and would respect the principle of non-discrimination (art. 10).

51. Chapter VI of the sixth report dealt with liability for harm to the so-called “global commons”, namely areas beyond national jurisdictions. In order to determine whether it was possible to extend the scope of the topic to liability for such harm, as he had undertaken to do at the previous session, he had decided to explore

three issues: the concept of harm to the global commons, the concept of “affected State” and the question whether responsibility for wrongfulness or “causal” liability should be established with regard to such damage. Once those three issues had been explored, there was also the question whether, under existing international law, any consequences flowed from harm done by an individual or a State to the global commons.

52. In section B of chapter VI, a distinction was drawn according to whether the harm affected persons or property—either private or State property—in such places or whether it affected the environment exclusively. The second alternative was the only one that should be explored, since the first was covered by the draft articles. There was apparently scant precedent, however, for liability for that type of harm. Furthermore, the international decisions concerning transboundary harm on which he had based his reasoning, such as those in the *Corfu Channel* and *Trail Smelter* cases (see (A/CN.4/384, annex III), referred to harm caused directly or indirectly to certain States. Even the applicability of the *sic utere tuo* principle was doubtful, since it might be asked to whom the global commons belonged. To which legal person was the damage done? And what was the relevance in law of damage which could not be measured, but was only suspected or presumed, or which was only a part of the total effect necessary to affect persons or property? The existing concept of harm did not readily lend itself to application to the global commons. What would be the threshold at which the harm became “appreciable” or “significant”? What compensation should be awarded for such intangible harm, and to whom?

53. He had encountered some difficulties with regard to the affected State, which was dealt with in section E of chapter VI. He would suggest, on the basis of paragraph 2 (f) of article 5 of part 2 of the draft articles on State responsibility provisionally adopted by the Commission at its thirty-seventh session,<sup>16</sup> that the possibility should be explored of treating as an “injured State” any State party to a multilateral treaty under which the right infringed arose, when that right had been established for the protection of the collective interests of the States parties.

54. Before considering whether responsibility for wrongfulness or “causal” liability should apply, another question had to be answered: if it was true that, at present, no consequence arose out of harm to the environment in the global commons, could that situation be allowed to continue if it was certain that catastrophic and irreparable damage to that environment might occur? The answer to that question was obviously in the negative.

55. In order to put an end to that situation by means of legal instruments, a distinction should perhaps be drawn between activities involving risk and activities with harmful effects. In the case of activities involving risk, there was no other solution than to apply causal liability wherever possible. It should be relatively easy to identify the accidents likely to cause harm to the

<sup>16</sup> *Yearbook* . . . 1985, vol. II (Part Two), p. 25.

global commons because of their intrinsic magnitude, the consequence of which could be, whenever possible, the restoration of the *status quo ante*. As for activities with harmful effects, the conventions on environmental protection either simply prohibited causing harm to the environment, or banned the emission of certain substances or the emission of such substances above a certain level. The last solution seemed to be a workable one, since it was possible to verify levels of emission in one way or another and thus to establish a breach of the obligation in question.

56. The question then arose of the sanction to be applied in the event of a breach. Compensation seemed to be out of the question in most cases. Whatever sanction might be imposed, any penal character it might have would not be easily accepted by States. He would therefore suggest that thresholds should be established, on the basis of the emission levels for certain substances laid down in existing conventions and protocols, above which the mechanisms of consultation provided for in the draft articles would come into play. The purpose of such consultations would be to enforce the régime of emissions through co-operation or some other method that did not amount to a penalty. He recognized, however, that the principle of consultations was also not easily accepted by States that did not fulfil their obligations. The publication of a report on a State which did not abide by the commitments it had entered into, for example with respect to human rights, was sometimes enough to make that State take the necessary measures.

57. In the report (A/CN.4/428 and Add.1, para. 84), he suggested that the concept of harm, as referred to in draft article 2, subparagraph (g), should be extended to provide that the harm affected the collective interests of the States parties to the future convention and occurred whenever quantities above certain stipulated levels were introduced into the environment of the global commons.

58. Lastly, he would point out, by way of a preliminary conclusion, that the principles governing the topic could apply, *mutatis mutandis*, to the global commons in most cases just by adding a reference to damage caused in areas beyond national jurisdictions, as provided for in certain conventions such as the 1982 United Nations Convention on the Law of the Sea and in Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).<sup>17</sup> In that connection, the situation of the developing countries should not be forgotten. However the principles were interpreted, the special situation of those countries should be taken into account because they were not the ones that had contributed to the pollution of the atmosphere and to the greenhouse effect from which the Earth was now suffering.

59. He had some other ideas and preliminary conclusions concerning the application of no-fault liability in the case of harm to the global commons, but would

first like to compare them with the arguments that would be put forward in the coming debate. He would therefore make them known to the Commission at a later stage.

60. Mr. BEESLEY said that he would be grateful if the Special Rapporteur could in due course explain in more detail why he had undertaken a radical restructuring of his approach. For his own part, he preferred the earlier approach.

61. Mr. FRANCIS said that he was a little perturbed at the prospect of the Commission having to cover the range of issues that would arise in the context of the topic in the limited time available. In view of the importance of the topic, the Commission would not be able to do justice to the whole of the Special Rapporteur's sixth report (A/CN.4/428 and Add.1). He trusted that it would be possible to give due consideration to the first three chapters and that the Commission would not try to do too much in the time allotted.

#### Closure of the International Law Seminar

62. The CHAIRMAN, speaking on behalf of the Commission, said he hoped that the experience gained by the participants in the twenty-sixth session of the International Law Seminar would be of practical value to them in their future study or work and, in particular, that their three weeks' attendance at the Commission's plenary meetings would have given them some idea of the work and working of the Commission. He also hoped that, as had already occurred, some of the participants might one day be elected members of the Commission, a prestigious body with lofty ideals and noble functions that contributed to the rule of law in the international community.

63. No matter from which professional walk of life they came, the participants all worked in their own different ways for the common cause of promoting the rule of law in international relations. The Seminar would have provided participants from different countries and continents with an opportunity to form ties of friendship and the exchange of ideas would have promoted mutual understanding of and respect for the civilizations and cultures to which they belonged.

64. All in all, he hoped that, as a result of their experience, the participants would come to understand that the promotion of the rule of law in international relations, understanding of different value systems and respect for all peoples would contribute to greater fraternity throughout the world.

65. Mr. MARTENSON (Director-General of the United Nations Office at Geneva) said that, every year, the International Law Seminar, organized by the United Nations Office at Geneva in the framework of the International Law Commission, enabled young professors of international law, students and jurists at the start of their careers to further their knowledge, exchange points of view and become acquainted with developments in public international law.

66. Whether it was a matter of the quest for world peace, environmental protection, assistance to the millions of refugees fleeing war and famine, combating

<sup>17</sup> 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.

diseases having a world-wide impact or, indeed, the action taken to ensure greater protection for human rights, there was one self-evident fact: if the efforts were to bear fruit, they must be world-wide. The only conceivable perspective was that of a world organization whose potential must be harnessed in the most effective way.

67. To borrow the words of an eminent internationalist, as long as the international community was composed of States, it was only through the exercise of their will, as expressed in treaties and agreements or formulated by an international authority deriving its powers from States, that a rule of law could become binding on individuals. As Professor Jessup had stated, there was one inescapable fact, namely that the whole organization of the modern world rested on the coexistence of States and there could be no major change other than through the action, positive or negative, of States.

68. Despite the slow changes now taking place in that area in terms of an increased role for individuals in international life, the fact remained that public international law continued to govern primarily relations between States: the topics dealt with by the Commission provided a good illustration of that fact.

69. The twenty-sixth session of the International Law Seminar which was drawing to a close had also enabled participants to become acquainted with the activities of UNHCR, ICRC and GATT, as well as with certain procedures established for the protection of human rights and with the provisions of the 1989 Convention on the Rights of the Child, all areas vital in the closing years of the century at a time when the upheavals in the world gave a new dimension to the perspective and potential of the United Nations.

70. Mrs. BLAKE, speaking on behalf of the participants in the twenty-sixth session of the International Law Seminar, said that the Seminar had enabled them to observe closely the work of the Commission and, through their attendance at the Commission's morning meetings and at afternoon workshops, had provided them with a perception of the process of elaborating international law. The participants had been impressed by the breadth of knowledge and range of experience of those who had addressed them. They had also broadened their own knowledge by discussing different approaches to various issues and by gaining an appreciation of the fact that their role as Government official, researcher, practitioner or teacher could affect the way in which they focused on any one issue.

71. The participants, who were convinced of the inestimable value of the Seminar, wished to thank the Commission for its continued emphasis on the Seminar's importance, the Governments without whose generosity the Seminar could not be held, the Director-General of the United Nations Office at Geneva, the staff of the Legal Liaison Office for their assistance, the Gilberto Amado Fund which had welcomed them on the opening day and, lastly, the Canton of Geneva for its hospitality.

*The Director-General presented the participants with certificates attesting to their participation in the twenty-sixth session of the International Law Seminar.*

*The meeting rose at 12.25 p.m. to enable the Enlarged Bureau to meet.*

## 2180th MEETING

*Tuesday, 26 June 1990, at 10.00 a.m.*

*Chairman: Mr. Jiuyong SHI*

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

**Relations between States and international organizations (second part of the topic) (concluded) (A/CN.4/401,<sup>1</sup> A/CN.4/424,<sup>2</sup> A/CN.4/L.383 and Add.1-3,<sup>3</sup> A/CN.4/L.443, sect. G, ST/LEG/17)**

[Agenda item 8]

**FOURTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)**

**ARTICLES 1 TO 11<sup>4</sup> (concluded)**

1. Mr. DÍAZ GONZÁLEZ (Special Rapporteur), summing up the discussion, said that he was well satisfied with the debate that had taken place on his fourth report (A/CN.4/424) and welcomed the constructive proposals and ideas that had been put forward. All members of the Commission who had spoken in the debate, apart from one, were in general agreement with the fourth report, as well as with his second report,<sup>5</sup> and with the approach he had adopted, which had been approved by the Commission at its thirty-ninth session, and by the General Assembly at its forty-second session, in 1987.

2. He wished first to make some general remarks with a view to clarifying certain points made during the debate. In the first place, the topics considered by the Commission were not invented by special rapporteurs, nor, in the majority of cases, by the Commission itself:

<sup>1</sup> Reproduced in *Yearbook* ... 1986, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* ... 1989, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* ... 1985, vol. II (Part One)/Add.1.

<sup>4</sup> For the texts, see 2176th meeting, para. 1.

<sup>5</sup> *Yearbook* ... 1985, vol. II (Part One), p. 103, document A/CN.4/391 and Add.1.