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Summary record of the 2070th meeting

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diplomatic courier. As for the possibility of entrusting the bag to a member of the crew other than the captain of the ship or aircraft, since the question had been extensively discussed both in the Commission and in the Drafting Committee, and since the Commission had indicated in its commentary to paragraph 1 of article 23 that there was nothing to preclude that practice, he proposed that it should be given explicit form. The amendments he was suggesting for that purpose appeared in his report (*ibid.*, para. 200).

36. With regard to part III of the draft (Status of the diplomatic bag), one Government considered that article 24 should include more specific rules, but no clear-cut proposal had accompanied that extremely general observation. In his own view, the revised text of article 8, together with article 25, could provide the legal basis for identification of the bag, and article 24 should therefore be retained in its present form.

37. Article 25 had elicited a number of general observations as well as several drafting proposals which deserved careful consideration, but did not appear to justify a revision of the existing text (*ibid.*, paras. 204-211).

38. With respect to article 26, a number of general observations had been made concerning the need for rapid transmission of the bag and for avoiding lengthy delays and cumbersome procedures. In that connection, it would be recalled that the UPU Congress held at Rio de Janeiro in 1979 had rejected a proposal to introduce a new category of postal items under the name of "diplomatic bags" in the international postal service by amending the Union's international regulations.[12] At present, favourable treatment for diplomatic bags could be secured only through bilateral, regional or multilateral agreements between national postal services; a number of bilateral agreements along those lines had already been concluded. On the basis of the observations and proposals submitted by Governments, he was offering for the Commission's consideration a revised text of article 26 (*ibid.*, para. 215).

39. On article 27, he would refer members of the Commission to his report (*ibid.*, paras. 216-220), and point out that the revised text he proposed placed the sending State under the obligation to make adequate arrangements for ensuring the rapid transmission or delivery of its diplomatic bags.

40. Article 28 was one of the most controversial; it had been discussed extensively and divergent points of view had been expressed on it throughout the Commission's work on the topic. It was indeed, as had been pointed out, a key provision which raised a wide range of political, legal and methodological problems, to which he referred in his report (*ibid.*, para. 222). The diversity and the differences of opinion of Governments on that article (*ibid.*, paras. 225-242) had led him to submit three alternatives, A, B and C, for the article, accompanied by comments on them (*ibid.*, paras. 244-253).

41. The comments by Governments revealed that most States were opposed to examination of the bag through electronic devices. Moreover, the International Conference on Drug Abuse and Illicit Trafficking, to which the Chairman had referred (para. 7 above) and which was also referred to in the report (A/CN.4/417, paras. 235, 239 and 240), had concluded that measures to combat illicit drug trafficking through misuse of the diplomatic bag should be taken in strict conformity with the provisions of the four codification conventions. But that would be tantamount to having two different régimes: one for consular bags, and another for the other three types of bag. The Nordic countries had suggested in their observations the use of specially trained dogs to detect the presence of illicit drugs in bags. In his opinion, that method would have the advantage of not violating the confidential nature of the bag's contents. Moreover, in view of the severity of the drug-trafficking problem, it was likely that no State would oppose such a measure.

42. The remaining articles had been the subject of proposals relating primarily to drafting, except in the case of article 33, which most Governments suggested should be deleted on the grounds that it might create a plurality of régimes. Two Governments had also considered that it might be desirable to incorporate provisions on the settlement of disputes: he would welcome the opinions and advice of the Commission on that matter.

43. Lastly, he said that the Commission could adopt a number of approaches in considering his report: it could do so article by article, or section by section, or it could focus the discussion on the most controversial matters. If it adopted the third approach, he would suggest that it concentrate on the following issues: (*a*) the scope of the draft articles, and specifically the possibility of extending it to the couriers and bags of special missions and of international organizations; (*b*) the inviolability of the courier and the scope and content of the facilities, privileges and immunities granted to him (particularly arts. 17 and 18); (*c*) the contents and inviolability of the bag (art. 28); (*d*) the relationship between the draft articles and other conventions (art. 32), the optional declaration (art. 33), and the settlement of disputes.

The meeting rose at 1 p.m.

2070th MEETING

Wednesday, 29 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

[12] See in this connection the Special Rapporteur's fourth report, *Yearbook ... 1983*, vol. II (Part One), p. 121, document A/CN.4/374 and Add.1-4, paras. 316-317.

1. The CHAIRMAN announced that, in the week of 20 to 24 June 1988, the Commission had used 100 per cent of the conference servicing time allotted to it.

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/L.420, sect. F.3)

[Agenda item 4]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[3] ON SECOND READING (*continued*)

2. The CHAIRMAN reminded the Commission that, in his introductory statement, the Special Rapporteur had suggested that members should first comment on individual articles, then on the various parts of the draft, and lastly on substantive issues.

3. Mr. REUTER expressed his admiration of the scrupulous preparation of the eighth report (A/CN.4/417).

4. Referring to the protection of the diplomatic bag, he noted that the Commission had received a request for assistance in the fight against drugs from the International Conference on Drug Abuse and Illicit Trafficking.[4] It went without saying that he sympathized with the Conference's objectives, but it was not clear what specific steps the Commission could take; so far, it had always declined to limit the fundamental rights of States, even for so worthy a cause as combating drug abuse. Many proposals to accord special rights for combating drug trafficking on the high seas had been submitted at the Third United Nations Conference on the Law of the Sea, but none had been adopted. The nature of the action the Commission could take would ultimately depend on the overall régime it selected for the diplomatic bag.

5. He wished to raise two points which showed how the Special Rapporteur's thinking on the draft articles had evolved. With respect to article 1, he did not oppose the granting to international organizations of certain immunities normally accorded only to States, but feared that a number of technical difficulties might arise. No two international organizations were alike, and opening the instrument to all of them through a general rule like the one proposed by the Special Rapporteur in his report (*ibid.*, para. 60), might be like overloading a boat so much that it sank.

6. He drew attention to article 1, paragraph 1 (2), of the 1975 Vienna Convention on the Representation of States, which provided that:

(2) "international organization of a universal character" means the United Nations, its specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are on a world-wide scale;

The Commission might consider following that precedent and stipulating that the instrument in preparation covered only international organizations of a universal character, many of which already benefited from certain privileges and immunities under conventions or headquarters agreements. It might also draw on article 90 of the 1975 Convention, which established a special mechanism whereby universal organizations not parties to the Convention could "adopt a decision to implement" its "relevant provisions". There was also a precedent for enabling international organizations to become parties to an international instrument, but that approach had political implications, and the reaction of States had never been entirely enthusiastic. He was therefore inclined to believe that if accession to the instrument was made possible only for organizations of a universal character, the chances of winning State support would be increased.

7. Mr. Calero Rodrigues had rightly pointed out that article 4 might need to be revised to conform with the greater need of international organizations to communicate with their own departments and offices in other countries than with other international organizations and States parties to the instrument.

8. The second innovation in the thinking of the Special Rapporteur appeared in article 33. The text provisionally adopted at the thirty-eighth session enabled States that had slight reservations regarding the future Convention to make an optional declaration limiting its application to certain categories of diplomatic courier and diplomatic bag. A great deal of care and thought had gone into the drafting of article 33, but the Special Rapporteur was now proposing that it be deleted, on the grounds that many Governments had not supported it or had objected to it outright (*ibid.*, para. 277). Yet the patterns forming over the past few years showed that Governments were stressing the need for greater flexibility in their multilateral treaties, and that their ratification of major conventions was accompanied by a growing number of reservations. The Commission had traditionally considered that reservations were a matter for the State alone to decide, but jurists must nevertheless take account of the growing need for flexibility in the terms of treaties.

9. He would therefore regret the deletion of article 33, although he would not oppose it. If the Commission accepted the Special Rapporteur's recommendation, it should include in its commentary a full explanation for the deletion of an article which had provided the flexibility so obviously desired by States.

10. Mr. McCAFFREY congratulated the Special Rapporteur on a scholarly report (A/CN.4/417) that diligently reflected the views expressed by members of the Commission.

11. It was to be hoped that the Commission could so conduct its debate as to be able to refer a substantial body of articles to the Drafting Committee at the current session. Of course, the Drafting Committee would not be able to take them up at present, but it would be in a position to begin work on them at the start of the Commission's next session. That was particularly desirable because the Commission's goal was to com-

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

[2] *Ibid.*

[3] For the texts, see 2069th meeting, para. 6.

[4] See 2069th meeting, footnote 8.

plete consideration of the draft articles on second reading within its present members' term of office.

12. In its work on the draft articles, the Commission should focus on the four principal issues identified by the Special Rapporteur in his introductory statement (2069th meeting, para. 43). Most of the articles were not controversial and required only a little drafting work. If the Commission were to discuss each of them individually, the tendency of lawyers to find fault with even the best of formulations would militate against completion of the second reading.

13. At the risk of speaking at an inappropriate stage in the Commission's work, he wished to express his profound doubts about the wisdom of drafting an instrument on a topic which was ill-conceived and fundamentally flawed. The basis for the Commission's work had been the four codification conventions.[5] However, the Special Rapporteur observed in his report (A/CN.4/417, para. 54) that a great many States had not become parties to the 1969 Convention and the 1975 Vienna Convention. In view of that poor ratification record, taking all four conventions as the basis for the Commission's work was like sitting on a chair with only two legs.

14. Even if all four conventions had been generally accepted, however, problems would arise, because their provisions on critical points, and their functions, varied widely. When States had consciously and deliberately developed such different rules to cover different situations, it was hard to see how the objective of consolidating, harmonizing and unifying existing rules, referred to by the Special Rapporteur (*ibid.*, para. 11) could be attained.

15. It would also be extremely difficult to achieve a second objective envisaged by the Special Rapporteur, namely "to develop specific and more precise rules for situations not fully covered" by the codification conventions (*ibid.*). The fact that the most controversial provisions of the draft articles were precisely those that attempted to achieve greater precision showed that it was almost impossible to embrace a wide variety of circumstances and political relations in a set of specific and precise rules. Previous attempts to elaborate detailed rules had been abandoned. The 1961 United Nations Conference on Diplomatic Intercourse and Immunities had declined to address many details of the régime for the diplomatic bag, because attempts to settle various specific issues had created more problems than they had resolved. And the controversial nature of several key articles of the draft showed that the situation had not changed in the 27 years since the Vienna Convention on Diplomatic Relations had been concluded.

16. For all that, he was willing to admit that the main purpose, namely to facilitate the tasks of customs officials, on whom the four different régimes imposed very heavy burdens, was to some degree useful. It would be useful to harmonize most aspects of the law governing the diplomatic courier and the diplomatic bag, but not those that were most sensitive, namely, the areas dealt with in article 28, on protection of the bag.

17. On the first of the main issues identified by the Special Rapporteur and addressed in article 2, that of couriers and bags not within the scope of the present articles, in particular couriers and bags employed for the official communications of international organizations, he took the view that the text adopted on first reading should be maintained. As the Special Rapporteur pointed out in his report (*ibid.*, para. 54), the 1975 Vienna Convention on the Representation of States had not yet come into force; and in any event that Convention did not deal with international organizations of a regional, operational or quasi-commercial character. Régimes for those international organizations that needed them most had already been provided, as the Special Rapporteur stated (*ibid.*, para. 57), 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. That being so, he wondered whether the Commission would be well advised to delete article 2 and replace it by a new paragraph 2 to article 1, as suggested by the Special Rapporteur (*ibid.*, para. 60). Like Mr. Reuter, he feared that a blanket reference to international organizations would open a veritable Pandora's box and jeopardize any chances of acceptance the draft might possess.

18. In conclusion, he reiterated the hope that the debate would enable the Commission to refer a substantial body of articles to the Drafting Committee at the current session, so that the Committee could start work on them at the beginning of the next session.

19. Mr. OGISO said that, although he intended to discuss the four key issues identified by the Special Rapporteur (2069th meeting, para. 43), he wished also to comment on some other important points on which comments had been received from Governments.

20. On article 2, he differed from the previous speakers in having some sympathy with the Special Rapporteur's proposal for a new paragraph 2 to be added to article 1 (A/CN.4/417, para. 60). If it was the wish of the United Nations that the future instrument should permit United Nations Headquarters to use the diplomatic courier and bag for its communications with States, other international organizations of a universal character and branch offices of the United Nations, he saw no objection to such a proposal. Nevertheless, the points raised by Mr. Reuter and Mr. McCaffrey deserved careful consideration, and he hoped that the Special Rapporteur would provide a detailed explanation of his position on the matter when replying to the debate.

21. In regard to article 5, paragraph 2, he noted the Special Rapporteur's suggestion (*ibid.*, para. 82) that the second sentence could be deleted. While having no strong opinion on the matter, he wondered whether the deletion, on second reading, of the reference to the courier's "duty not to interfere in the internal affairs of the receiving State or the transit State" might not give the mistaken impression that the Commission did not consider that obligation very important. To convey such an impression would be highly undesirable, and he was therefore inclined to favour retaining paragraph 2 of article 5 as it stood.

[5] *Ibid.*, footnote 10.

22. Referring to article 7, he drew attention to the contradiction between the Special Rapporteur's view that the article codified a rule established in State practice (*ibid.*, para. 95) and the comment by a Government to the effect that the matters enunciated in the article had not previously been regulated by international agreement and did not require such regulation (*ibid.*, para. 94). It would be helpful if the Special Rapporteur could indicate how many international conventions or national legislations contained the rule set out in article 7.

23. In regard to paragraphs 1 and 2 of article 9, he remarked that among the junior members of diplomatic missions there might be some with dual nationality, who were nationals of both the sending and the receiving State. In the interests of convenience in the application of article 9, it would be useful to provide clarification, in the commentary if not in the article itself, concerning the status of a courier possessing dual nationality.

24. He had noted the general comment by the Austrian Government on article 13, referred to in the report (*ibid.*, para. 124), and wondered whether the Special Rapporteur had considered that Government's suggestion that the article might be redrafted so as "to lay down the general duty of the receiving or transit State to assist the diplomatic courier in the performance of his functions" (A/CN.4/409 and Add.1-5). His own view was that the mandatory wording of paragraph 1 of article 13 was unnecessarily strong; the provision could, for example, be interpreted to mean that, if the airport at which the courier arrived was situated at an inconvenient distance from the capital, the receiving State or transit State was under an obligation to provide him with means of transport. A text along the lines suggested by Austria might attenuate that obligation without substantially affecting the Special Rapporteur's original purpose.

25. Widely divergent views on article 17 were reported by the Special Rapporteur (A/CN.4/417, paras. 140 *et seq.*). His own opinion was that, since the Vienna Conventions of 1961 and 1963 both limited the concept of inviolability to the person of the courier and to official correspondence and documents contained in the diplomatic bag, and since neither Convention referred to temporary accommodation, the criticisms of the article deserved careful study. Indeed, he wondered whether the Commission might not reconsider whether the first sentence of paragraph 1 need be retained. If it were decided to delete that sentence, the title of the article would also have to be amended, possibly to read "Protection of temporary accommodation". As to the amendment proposed by the USSR to paragraph 3 of the article (A/CN.4/409 and Add.1-5), the stipulation appearing at the end of the proposed text, "so that its representative can be present during such inspection or search", might in practice have the effect of vetoing the inspection or search. While he agreed that temporary accommodation should not be treated as legally inviolable, and was therefore prepared to accept the Soviet proposal, he would suggest that the passage in question might be dropped, and that the proposed text should end with the words "to communicate with the mission of the sending State".

26. In introducing article 18, the Special Rapporteur had expressed willingness to accept the proposal of the German Democratic Republic for an additional sentence at the end of paragraph 2 (see 2069th meeting, para. 31). He would appreciate it if the Special Rapporteur, in his replies at the end of the debate or, better still, in the commentary to the article, would confirm that paragraph 2 should be understood to mean, first, that the courier enjoyed immunity from the civil and administrative jurisdiction of the receiving State or, as the case might be, of the transit State in respect of acts performed in the exercise of his functions; secondly, that such immunity did not apply to a civil action brought by a third party for damage arising from an accident caused by a vehicle driven by the courier; thirdly, that, to the extent that such damage was not recoverable from insurance, the courier could not invoke immunity and was subject to civil liability, in other words, that the receiving or transit State was not prevented from bringing a civil action for tort before the insurance company had paid the indemnification.

27. Lastly, he noted that the Special Rapporteur had raised five points concerning article 28 as being the "main critical issues" (A/CN.4/417, para. 222). With regard to the second point, "The admissibility of scanning of the bag", he could not agree with the provision in paragraph 1 of article 28 that the diplomatic bag "shall be inviolable wherever it may be". Neither in the 1961 Vienna Convention nor in the 1963 Vienna Convention was there any provision for inviolability of the bag. In fact, six or seven Governments had stated in their replies that scanning of the bag should be permitted in cases where the receiving State or the transit State had serious reason to believe that it contained objects not for official use. Considering the number of Governments that had made that point, he was surprised that the Special Rapporteur had not provided for the possibility of scanning the bag in any of the three alternative texts he had submitted (*ibid.*, paras. 244-253). The Commission should not exclude that possibility without a very thorough discussion.

28. He suggested that, in the three alternatives suggested for article 28, paragraph 1, the text be reworded to read: "The diplomatic bag shall not be opened or detained", removing all reference to inviolability. That text was taken from article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. There was every advantage in adhering to the language of that Convention.

29. For article 28, paragraph 2, the proposal made by the Government of the Federal Republic of Germany (A/CN.4/409 and Add.1-5) could be a fourth alternative serving as a good basis for discussion.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/406 and Add.1 and 2,[6] A/CN.4/412 and Add.1 and 2,[7] A/CN.4/L.420, sect. C, A/CN.4/L.421)

[Agenda item 6]

[6] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

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

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

30. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles adopted by the Committee (A/CN.4/L.421).

31. Mr. TOMUSCHAT (Chairman of the Drafting Committee) expressed his appreciation to the members of the Drafting Committee and to other members of the Commission who had taken an active part in its deliberations. He was very grateful to the Special Rapporteur for his untiring efforts and constructive spirit and to the secretariat for its valuable assistance.

32. At its previous session, the Commission had provisionally adopted four of the five articles of part I (Introduction) and the first two articles of part II (General principles), namely articles 6 and 7.[8] It had left aside article 1 (Use of terms).

33. The Drafting Committee had begun by considering article 9, referred to it by the Commission in 1984, which was now article 8. The Committee had then taken up six articles which had been referred to it at the previous session, starting with former article 10, which was now article 9. Lastly, it had dealt with article 15 [16], which the Commission had referred to it at the current session (see 2052nd meeting, para. 51). He would refer to the articles by their new numbers, followed where necessary by the former number in square brackets.

ARTICLE 8 [9] (Obligation not to cause appreciable harm)

34. The Drafting Committee proposed the following text for article 8 [9]:[9]

Article 8 [9]. Obligation not to cause appreciable harm

Watercourse States shall not utilize an international watercourse [system] in such a way as to cause appreciable harm to other watercourse States.

35. The Drafting Committee had considered at some length whether the article should be worded to take account of the possibility of conflict between the "no-harm" principle it enunciated and the principle of equitable and reasonable utilization stated in article 6. It had come to the conclusion that the two principles were not incompatible, since utilization of a watercourse could not be equitable if it caused appreciable harm—the emphasis being on the word "appreciable"—and since, should the achievement of equitable and reasonable utilization depend on one or more States tolerating a measure of harm, the accommodations required would be arrived at by way of specific agreements.

36. The Drafting Committee had considered that the no-harm principle would be more forceful if couched in terms of an obligation to ensure that no appreciable harm was caused, rather than in terms of a duty to refrain from causing harm. Hence the formulation proposed.

37. The Committee had substantially simplified the text referred to it by the Commission. It had deleted the words "within its jurisdiction" as being superfluous; it had eliminated the reference to "activities", because article 2, as provisionally adopted, did not mention "activities"; and it had replaced the concept of "uses" by that of "utilization", which was more comprehensive and appeared in article 6.

38. The Drafting Committee wished to make it clear that the expression "appreciable harm" referred to factual harm, in other words the physical, tangible and identifiable effects of the utilization of a watercourse, and not to legal injury, as meaning the infringement of rights that would entail international responsibility. Accordingly, the Committee had deleted the words "the rights or interests of". With reference to the term "appreciable", the Committee drew attention to paragraphs (15) and (16) of the commentary to article 4 as provisionally adopted, where it was said that the word "appreciable" was not used in the sense of "substantial" but was intended to convey the idea that the harm could be established by objective evidence.[10]

39. The concluding phrase of the former text, "unless otherwise provided for in a watercourse agreement or other agreement or arrangement" had been dropped as being unnecessary in view of the Commission's decision to prepare a framework agreement containing residual rules to be supplemented by other agreements.

40. The Drafting Committee had inserted the word "system" in square brackets after the words "international watercourse" wherever they appeared, in accordance with the Commission's decision—referred to in paragraph (2) of the commentary to article 2—to use that formula pending adoption of the definition of the term "international watercourse".[11]

41. It should be noted that, in accordance with the Commission's statement in paragraph (3) of the commentary to article 2, the reference in article 8 [9] to an international watercourse [system] should be read as including the waters.

42. It would be recalled that, in the discussion on article 11, at the previous session, it had been asked whether the term "State" included private activities within a State, and that the Special Rapporteur had answered in the affirmative.[12] It was a basic purpose of the draft under discussion to ensure that a State should not be able to disclaim responsibility for private activities authorized or permitted by it.

43. Lastly, for reasons of consistency, the opening words of the original draft article ("A watercourse State") had been replaced by "Watercourse States".

44. Mr. RAZAFINDRALAMBO, supported by Mr. MAHIOU, suggested that the wording of article 8 [9] should be brought into closer conformity with the title of the article. Instead of stating that watercourse States "shall not utilize an international watercourse [system] in such a way as to cause appreciable harm to other

[8] See 2050th meeting, footnote 3.

[9] For the original text, see *Yearbook . . . 1987*, vol. II (Part Two), p. 23, footnote 80.

[10] *Ibid.*, p. 29.

[11] *Ibid.*, p. 26.

[12] *Ibid.*, p. 24, para. 107.

watercourse States", the text should state that watercourse States "shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States".

45. Mr. YANKOV noted that the word "system", in square brackets, was used whenever the words "international watercourse" appeared in the draft articles. But in the article under consideration, the words "watercourse State" were used without the word "system" in square brackets. He wished to know whether any change was intended.

46. There had been much discussion about the expression "appreciable harm", but it should be remembered that the term "appreciable" had been used in State practice, in particular in certain regional agreements.

47. Mr. PAWLAK proposed that the commentary should explain that the word "appreciable" meant factual harm based on objective evidence. Understood in that sense, he could accept the term "appreciable harm", on which the whole structure of the draft was based.

48. Mr. BENNOUNA noted that the Special Rapporteur had said that there was no contradiction between article 8 [9] and article 6, on equitable utilization, since the obligation of equitable utilization presupposed that harm would not be caused or, conversely, that utilization which caused appreciable harm would not be equitable. He entirely agreed with the relationship thus established between the two articles; indeed, it seemed to him so important that it should not only be reflected in the commentary but should also be covered in the text of the draft. The Commission might therefore wish, when reverting to article 6, to include an appropriate reference in that article to article 8, and possibly also to article 16, which dealt with the prevention of pollution and also embodied the notion of appreciable harm.

49. He endorsed Mr. Razafindralambo's proposal: it would be far more elegant and logical to draft the first phrase of article 8 [9], dealing with utilization, in positive terms and the second, dealing with the obligation not to cause appreciable harm, in negative terms.

50. Mr. GRAEFRATH said he appreciated that it was the Special Rapporteur's intention that the rule in article 8 [9] should generate responsibility, not liability, and that there was therefore a link between that article and article 6. Unfortunately, that link was not apparent from the text and the resultant difference between responsibility and liability was not clear.

51. He would have preferred a word other than "appreciable", such as "significant". In his view, the rule laid down in the article would have been clearer had it read:

> "Watercourse States shall ensure that the use of an international watercourse within their territory is in conformity with their obligations under article 6 and shall take the necessary measures to prevent significant harm from being caused to other watercourse States."

52. Mr. ROUCOUNAS said that he had always had reservations about the term "appreciable harm" and was not sure that the explanations given by the Chairman of the Drafting Committee would remove the difficulties. Mr. Graefrath's comments showed the need for further clarification concerning the threshold of responsibility for harm.

53. Like Mr. Yankov, he would welcome an explanation from the Chairman of the Drafting Committee regarding the omission of the word "system".

54. Mr. ARANGIO-RUIZ said that, as he had already stated (2065th meeting) in connection with article 16, he disliked the word "appreciable", not because he would prefer a stronger term, but because he thought the word "harm" should stand alone, especially when a plurality of States were concerned with an international watercourse. The fact that one State did not cause appreciable or significant harm would not preclude harm which, if cumulative, could become appreciable, or indeed disastrous. He would therefore be grateful if the Special Rapporteur could include an explanation of the term "appreciable" in his comments to article 8 [9], with particular reference to the problem of cumulative harm, whether appreciable or not, due to the fact that a plurality of States used the watercourse.

55. Mr. Sreenivasa RAO agreed that article 8 [9] should be reworded as proposed by Mr. Razafindralambo. He welcomed the clarification provided by the Chairman of the Drafting Committee regarding the use of the term "appreciable harm" and would favour explaining in the commentary that that term denoted a factual objective standard as opposed to legal injury.

56. While he had no preference for any particular qualifying word, whether "appreciable", "substantial" or "significant", all of which had been defined in much the same way by legal writers, he thought it would be better to retain the existing term so as not to add to the confusion in conceptual thinking.

57. With regard to the linkage between articles 8 [9] and 6, as he saw it the draft articles were interrelated and it would be better to leave certain principles as they stood, so that they could be applied and interpreted flexibly in each case. He was therefore opposed, as a matter of drafting technique and also of policy, to overburdening the articles with specific linkages.

58. With regard to the point raised by Mr. Arangio-Ruiz, the article did not preclude the possibility of treating cases of cumulative harm as appreciable harm. He would therefore prefer to leave the article as drafted, since it was in line with the thinking of the Commission and of the Sixth Committee of the General Assembly.

59. Mr. EIRIKSSON observed that, for ease of reference, some of the articles drafted at the Commission's previous session, in particular article 6, should be included in the Commission's report to the General Assembly. To avoid confusion, Mr. Yankov's point, which was reflected in the commentary to article 3,[13] should also be included in that report.

60. The CHAIRMAN, speaking as a member of the Commission, said that he too had noted with some concern the omission throughout the draft of the word "[system]". The Commission had adopted a working

[13] *Ibid.*, p. 26.

hypothesis as the basis for its consideration of the topic and should abide by that hypothesis. He therefore agreed entirely with Mr. Yankov's remarks.

61. He also agreed that it would be far more elegant if the first part of article 8 [9] were drafted in positive, and the second in negative terms.

62. A more substantive point concerned the word "appreciable". In Spanish, it would be more logical to replace the words *daños apreciables* by *perjuicio*, dropping the word *apreciables*. Despite his reservations about that expression, however, he would not oppose the adoption of the article, the substance of which he agreed with. The commentary to the article should, however, include a reference to the fact that some members had reservations regarding the adjective used to qualify the word "harm".

63. Mr. TOMUSCHAT (Chairman of the Drafting Committee), replying to the points raised, said that there would be no difficulty in accommodating the suggestion that the first part of article 8 [9] should be drafted in positive, and the second in negative terms.

64. The term "watercourse States" had been used rather than "watercourse system States", simply because the terms adopted in 1987, specifically in articles 3 *et seq.*, had been followed.

65. A more difficult question concerned the standard of appreciable harm. A number of suggestions had been made which, in a way, cancelled each other out. Consequently, although he too had reservations about the word "appreciable", the best solution would perhaps be to retain that word, especially as it seemed to command the widest support.

66. The linkage between articles 6 and 8 [9] was clear from the structure of the draft, since it was apparent from the sequence of the articles that article 8 [9] modified article 6, and that the two articles should be read in conjunction. He sympathized in particular with the remarks of Mr. Sreenivasa Rao and would therefore suggest that article 8 [9] be retained as drafted, without indicating a linkage with article 6.

67. Mr. MAHIOU said he agreed with the Chairman of the Drafting Committee that the omission of the word "[system]" was a logical consequence of what had been agreed in 1987, when the first articles had been adopted. The fact that the word did not appear in articles 3 *et seq.* did not, however, prejudge the matter; that was the understanding on which the articles in question had been adopted in 1987. He trusted that his explanation would obviate the need for further discussion on that point.

68. The CHAIRMAN suggested that, in the commentary to article 8 [9], a reference should be made to the reservations expressed concerning the word "appreciable".

69. Mr. BARSEGOV said that, if the commentary was to record reservations concerning the word "appreciable", it should also mention the word "substantial", to which a number of members had referred.

70. The CHAIRMAN suggested that the first part of article 8 [9] should be reworded in positive terms and the second part in negative terms, and that members' comments and reservations should be reflected in the commentary.

It was so agreed.

71. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 8 [9].

Article 8 [9] was adopted.

ARTICLE 9 [10] (General obligation to co-operate)

72. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 9 [10], which read:

Article 9 [10]. General obligation to co-operate

Watercourse States shall co-operate on the basis of sovereign equality, territorial integrity and mutual benefit in order to obtain optimum utilization and adequate protection of an international watercourse [system].

73. Article 9 corresponded to article 10 as proposed by the Special Rapporteur at the previous session.[14] In considering the provision, the Drafting Committee had borne in mind that, although opinions had diverged concerning the existence of a general obligation of States to co-operate, there had been no objection, either in the Commission or in the Sixth Committee, to the inclusion in the draft of an article on that duty, which was a logical premise of the procedural obligations enunciated in subsequent articles.

74. It had been agreed in the Drafting Committee that article 9 [10] should specify both the foundations and the objective of the duty to co-operate. For the foundations, the Committee had decided to add the words "on the basis of sovereign equality, territorial integrity and mutual benefit" after the words "shall co-operate", in accordance with the proposal referred to at the end of paragraph 98 of the Commission's report on its previous session.[15] It had also considered the possibility of describing the objective of co-operation in some detail, but had decided that a general formulation would be more appropriate in view of the diversity of international watercourses. The wording proposed by the Drafting Committee, "in order to obtain optimum utilization and adequate protection of an international watercourse [system]", was derived from the second sentence of paragraph 1 of article 6 as provisionally adopted in 1987. The Committee had deleted, as being superfluous, the latter part of the original text, from the words "in their relations concerning international watercourses".

75. Lastly, as suggested by a number of members at the previous session, including the Special Rapporteur, the Drafting Committee recommended that article 9 [10] should be placed in part II, on general principles.

The meeting rose at 1 p.m.

[14] For the text, *ibid.*, p. 21, footnote 76.

[15] *Ibid.*, p. 22.