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Summary record of the 2062nd meeting

Topic:
Law of the non-navigational uses of international watercourses

Extract from the Yearbook of the International Law Commission:-
1988, vol. I

summing-up of the discussion, be referred to the Drafting Committee. If there were no objections, he would take it that the Commission agreed to refer draft article 11 to the Drafting Committee.

It was so agreed.[27]

75. Mr. McCAFFREY, recalling that the Commission had decided in principle not to refer draft articles to the Drafting Committee prematurely, said that he had some reservations about the advisability of referring to the Committee the provisions of draft article 11 relating to mercenarism and terrorism, as well as paragraphs 4 and 5.

76. The CHAIRMAN said that the Drafting Committee would take Mr. McCaffrey's reservations into account.

The meeting rose at 1.05 p.m.

[27] See draft articles 11 and 12 as proposed by the Drafting Committee (2084th meeting, paras. 68 *et seq.*, and 2085th meeting, paras. 23 *et seq.*).

2062nd MEETING

Wednesday, 15 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

later: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, 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.

1. The CHAIRMAN announced that, in the week of 6 to 10 June 1988, the Commission had used 100 per cent of the conference servicing time allotted to it.

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

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

* Resumed from the 2052nd meeting.

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

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

PART V OF THE DRAFT ARTICLES:

ARTICLES 16 [17] TO 18 [19]

2. The CHAIRMAN invited the Special Rapporteur to introduce chapter III of his fourth report (A/CN.4/412 and Add.1 and 2), containing draft articles 16 [17], 17 [18] and 18 [19],[3] which read:

PART V. ENVIRONMENTAL PROTECTION, POLLUTION AND RELATED MATTERS

Article 16 [17]. Pollution of international watercourse[s] [systems]

1. As used in these articles, "pollution" means any physical, chemical or biological alteration in the composition or quality of the waters of an international watercourse [system] which results directly or indirectly from human conduct and which produces effects detrimental to human health or safety, to the use of the waters for any beneficial purpose or to the conservation or protection of the environment.

2. Watercourse States shall not cause or permit the pollution of an international watercourse [system] in such a manner or to such an extent as to cause appreciable harm to other watercourse States or to the ecology of the international watercourse [system].

3. At the request of any watercourse State, the watercourse States concerned shall consult with a view to preparing and approving lists of substances or species the introduction of which into the waters of the international watercourse [system] is to be prohibited, limited, investigated or monitored, as appropriate.

Article 17 [18]. Protection of the environment of international watercourse[s] [systems]

1. Watercourse States shall, individually and in co-operation, take all reasonable measures to protect the environment of an international watercourse [system], including the ecology of the watercourse and of surrounding areas, from impairment, degradation or destruction, or serious danger thereof, due to activities within their territories.

2. Watercourse States shall, individually or jointly and on an equitable basis, take all measures necessary, including preventive, corrective and control measures, to protect the marine environment, including estuarine areas and marine life, from any impairment, degradation or destruction, or serious danger thereof, occasioned through an international watercourse [system].

Article 18 [19]. Pollution or environmental emergencies

1. As used in this article, "pollution or environmental emergency" means any situation affecting an international watercourse [system] which poses a serious and immediate threat to health, life, property or water resources.

2. If a condition or incident affecting an international watercourse [system] results in a pollution or environmental emergency, the watercourse State within whose territory the condition or incident has occurred shall forthwith notify all potentially affected watercourse States, as well as any competent international organization, of the emergency and provide them with all available data and information relevant to the emergency.

3. The watercourse State within whose territory the condition or incident has occurred shall take immediate action to prevent, neutralize or mitigate the danger or damage to other watercourse States resulting therefrom.

3. Mr. McCAFFREY (Special Rapporteur) said that chapter III of his fourth report (A/CN.4/412 and Add.1 and 2) dealt with environmental protection, pollution and related matters.

[3] The numbers originally assigned to the articles appear in square brackets.

4. Referring to the part of the chapter devoted to background material, he noted that one of the Commission's most important functions was to help crystallize the thinking of the international community on certain subjects of current importance, in the light of rapidly changing international circumstances and the increased interdependence of nations and peoples. In *The Global 2000 Report*, a study prepared by the United States Council on Environmental Quality and quoted in his report (*ibid.*, para. 34), it was estimated that there would be a fivefold increase in the demand for water by the year 2000. When juxtaposed with the evidence that the amount of water on Earth was constant and could never be increased, that estimate gave cause for alarm and underlined the need to conserve water supplies, both quantitatively and qualitatively—a need that had been recognized by UNEP in its study entitled "The environmental perspective to the year 2000 and beyond".[4] One of the conclusions of that study was that mankind must conserve the Earth's resources in order to permit sustainable development, and that development was sustainable when it met the needs of the present without compromising the ability of future generations to meet theirs. In other words, the Earth's future must not be mortaged in order to realize present gains.

5. The interest of States in protecting fresh water quality was demonstrated in numerous international agreements, only a few of which were mentioned in the report (*ibid.*, paras. 39 *et seq.*). In those agreements, it was possible to discern an evolution in the approach of States to the question of pollution. The earliest approach had been to ban pollution outright, often in order to protect fisheries. The 1904 Convention between France and Switzerland for the regulation of fishing in their frontier waters (*ibid.*, para. 40) had prohibited the discharge into the water of "any waste or substances that may be harmful to fish". Thus even the earlier agreements had set water quality standards and provided for means of measuring the amount of pollution that was permissible: in the 1904 Convention, the standard adopted had been anything that was "harmful to fish".

6. Perhaps because man's capacity to pollute had increased tremendously, the more recent agreements defined water quality standards with reference to objective criteria, established water quality objectives, or actually regulated the discharge of various types of pollutants. An example of a recent agreement classifying pollutants on the basis of their harmful effects and regulating their discharge accordingly was the 1976 Convention on the Protection of the Rhine against Chemical Pollution (*ibid.*, para. 44), which contained a "black list" of dangerous substances whose discharge into the Rhine was to be eliminated, and a "grey list" of less dangerous substances whose discharge was to be reduced.

7. Other agreements adopted a different approach, requiring consultation with, or approval of, the parties or a joint commission before any action was taken that would alter water quality. The use of joint commissions had been particularly successful, and in some cases they were empowered to elaborate and implement general standards on pollution. A number of recent agreements went even further than the regulation of pollution and took very well defined steps to protect the environment: one example was the 1975 Statute of the Uruguay River, cited in the report (*ibid.*, paras. 40, 45 and 46).

8. A problem now becoming quite serious was that of pollution of the marine environment via international watercourses, and provisions to remedy it had been incorporated in the 1982 United Nations Convention on the Law of the Sea, as well as in a number of regional conventions cited in the report (*ibid.*, footnote 107) of his report. The recent news story about a floating slime mass in the North Sea attributed to agricultural runoffs and waste carried by rivers, which had killed thousands of fish and a great many seals, was a dramatic example of the problem of pollution of the marine environment via international watercourses.

9. In his report (*ibid.*, paras. 49-59), he had reviewed recent action by international non-governmental and intergovernmental organizations. As the material was voluminous he would not dwell on the subject, but only draw attention to the fundamental principle of harmless use of territory laid down in Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) (*ibid.*, para. 55), and to the set of principles adopted by ECE in 1987 relating to co-operation in the field of transboundary waters (*ibid.*, para. 56). ECE principle 1 used language almost identical with that of Principle 21 of the Stockholm Declaration, thereby attesting to the broad acceptance of that principle; it provided that States must ensure that activities carried out within their territory did not cause damage to the environment of other States or of areas beyond the limits of their national jurisdiction. ECE principle 8 (*d*) called attention to the importance of controlling the release of hazardous substances. A number of more recent instruments also focused on toxic substances, either banning their release or providing that measures must be taken to eliminate them rapidly following their release into the aquatic environment.

10. He had also referred in his report (paras. 60-79) to a number of studies prepared by international intergovernmental and non-governmental organizations. They included studies on the pollution of international watercourses recently prepared by the Institute of International Law, the International Law Association, and the Experts Group on Environmental Law of the World Commission on Environment and Development, otherwise known as the "Brundtland Commission".

11. Recent works by individual experts, cited in his report (*ibid.*, footnote 167), confirmed the existence of an international legal obligation to use the waters of international watercourses so as not to cause "appreciable", "substantial", "significant" or "sensible" harm to other watercourse States, and some commentators had even found that there was an obligation not to harm the environment of other States. The writers often used decisions by international courts and tribunals as the starting point for their analysis. The *Corfu Channel* case (*ibid.*, para. 83), in which the ICJ had referred to "every State's obligation not to allow

[4] General Assembly resolution 42/186 of 11 December 1987, annex.

knowingly its territory to be used for acts contrary to the rights of other States", was often cited. In the *Lake Lanoux* case (*ibid.*, para. 84), the tribunal had recognized in *dicta*, not in a holding, a rule "prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State". A similar principle had been announced by the arbitral tribunal in the *Trail Smelter* case (*ibid.*, para. 85). The *Gut Dam* case, involving Canada and the United States of America (*ibid.*, para. 86), could be taken as an instance of State practice in which the "State of origin" had recognized an obligation to provide compensation for transfrontier harm resulting from its use of an international watercourse. The *Poplar River* negotiations (*ibid.*, para. 87) had shown how two States could resolve, in a mutually satisfactory manner, the problem of the possibly injurious activity of a generating station before the station even began to operate.

12. In general, the background materials he had surveyed illustrated the long-standing concern of States about the pollution of international watercourses and showed that modern agreements recognized the intimate relationship between nature and mankind by providing for measures to safeguard the natural environment and ensure sustainable development.

13. Referring to the three draft articles submitted in his fourth report (see para. 2 above), he suggested that draft article 18 [19] should not be discussed extensively at the current session, since he would submit a new article entirely devoted to water-related hazards and dangers in a report to the next session. As for the other two draft articles, article 16 [17] set out the basic obligations of States with regard to pollution and article 17 [18] dealt with environmental protection.

14. Paragraph 1 of article 16 proposed a definition of pollution which might ultimately be incorporated in an introductory article with other definitions. The definition concentrated on the notion of alteration in the composition or quality of waters that resulted from human conduct and produced harmful effects. Paragraph 2 was the core of the article and represented a specific application of the principle of "no appreciable harm" contained in draft article 9, which had been referred to the Drafting Committee in 1984.[5] Paragraph 2 did not prohibit all pollution, only that which caused appreciable harm. As explained in paragraph (4) of his comments on article 16, "appreciable harm" was harm that was significant, in other words not trivial or inconsequential, but less than "substantial". The term "harm" was used in the factual sense to mean actual impairment of use, injury to health or property or a detrimental effect on the ecology of the watercourse. The word "harm" had been preferred to "injury", which had a number of additional legal connotations.

15. In paragraphs (6) *et seq.* of the comments, he explained that the obligation set out in paragraph 2 was not intended to be one of strict liability, but rather of due diligence: the duty to see that appreciable harm was not caused to other watercourse States or to the ecology of an international watercourse system. That concept was flexible and took account of practical realities and difficulties in controlling pollution, yet provided adequate protection for States affected by transfrontier water pollution. The vigilance of States, which was implicit in the requirement of due diligence, must be adapted to individual circumstances and depended on the extent to which the State could exercise effective control over its territory. In that sense, there was a parallel with the work on international liability for injurious consequences arising out of acts not prohibited by international law, since States which had no means of knowing what was happening in every part of their territory should not be penalized.

16. The obligation of due diligence raised the question whether a distinction should be made, as it was in some instruments, between existing pollution and new pollution. For the reasons set out in his report (A/CN.4/412 and Add.1 and 2, footnote 229), he did not think that would be useful for the purposes of controlling the pollution of international watercourses, and therefore did not propose that any such distinction should be made in the draft article. The modern trend in treaty practice seemed to be to distinguish between different pollutants by their harmfulness and to regulate their discharge accordingly.

17. The other issue that must be raised was the relationship of the obligation under article 16, paragraph 2, to the rule of equitable utilization stated in article 6, provisionally adopted by the Commission at its thirty-ninth session.[6] As he pointed out in paragraph (13) of his comments to article 16, water uses that caused appreciable pollution harm to other watercourse States and to the environment could well be regarded as being *per se* inequitable and unreasonable. The Commission would therefore be best advised to show its recognition of the importance of the prevention of pollution and environmental protection by adopting a rule of "no appreciable pollution harm" that was not qualified by the principle of equitable and reasonable utilization.

18. Paragraph 2 of article 16 also provided that watercourse States should not "cause or permit" the pollution of an international watercourse in such a manner as to produce the effects identified in paragraph 1. That meant that the State was obligated not only to refrain from causing the specified harm itself, but also to prevent its agencies or instrumentalities, as well as private parties within its territory or under its control, from causing such harm. The matter of the effect of pollution on the ecology of the watercourse was discussed in paragraph (18) of the comments. The need for a provision on protection of the ecology was borne out by the interrelationship between environmental protection and sustainable development, to which he had referred earlier.

19. Paragraph 3 was intended to reflect the emphasis placed in most recent international agreements on hazardous or dangerous substances, and the growing practice of States of preparing lists of substances that were to be banned, severely restricted or monitored. In

[5] See *Yearbook . . . 1987*, vol. II (Part Two), p. 23, footnote 80.

[6] See 2050th meeting, footnote 3.

that connection, he drew attention to the "List of selected environmentally harmful chemical substances, processes and phenomena of global significance", established by UNEP, which might be helpful (*ibid.*, footnote 253).

20. Draft article 17 concerned the protection of the environment of international watercourses, a subject which members would recognize as being of tremendous importance. As indicated in paragraph (3) of the comments to that article, such protection was most effectively achieved through individual and joint régimes specifically designed for that purpose. Unlike the previous special rapporteurs, he did not propose that watercourse States be required to adopt such measures and régimes, but the Commission might wish to consider adding such a provision.

21. Paragraph 2 addressed the important problem of pollution of the marine environment. As stated in paragraph (6) of the comments, it was important to note that the obligation set out in paragraph 2 was distinct from other obligations concerning pollution of international watercourses and protection of their environments.

22. Draft article 18 concerned pollution or environmental emergencies and addressed the kind of emergency situation that resulted from serious incidents, such as a toxic chemical spill or the sudden spread of a water-borne disease. Paragraph 1 gave a definition, and paragraph 2 required the State within whose territory such an incident had occurred to notify all potentially affected watercourse States. There was ample precedent for that requirement in the 1982 United Nations Convention on the Law of the Sea and in the 1986 Convention on Early Notification of a Nuclear Accident, both of which were quoted in paragraph (3) of the comments. Since watercourse States often established joint commissions or other competent international organizations, provision for notification of such organizations was made in paragraph 2.

23. Paragraph (5) of the comments referred to two subjects on which the Commission might wish to consider adding provisions to article 18, namely, joint preparation and implementation of contingency plans and the extent to which third States should be required to take remedial action. In keeping with his spare approach to the topic, he had not included such provisions, but he would not be averse to doing so.

24. As stated in the report (*ibid.*, para 90), the compact treatment of the subject of environmental protection and pollution in the draft articles in no way reflected a judgment that it lacked importance, but was an effort to concentrate on those areas that were most firmly rooted in State practice or for which there was especially compelling authority. He had referred to other subjects whose coverage in the draft articles would be desirable (*ibid.*, para. 91), concerning which he would welcome members' comments.

25. Regarding the organization of the Commission's debate, he suggested that draft articles 16, 17 and 18 should be discussed one at a time. He would not propose the referral of article 18 to the Drafting Committee, however, since he believed it would be more effective to incorporate it in a general article on water-related hazards and dangers, to be submitted in his next report. He would welcome members' comments on whether article 18 sufficiently covered the subject of emergencies.

26. Mr. BARBOZA said that because his remarks were of a preliminary nature, he would not follow the Special Rapporteur's suggestion and would discuss draft articles 16, 17 and 18 together. Chapter III of the report was broader in scope than the other chapters, which dealt only with the rights and duties of States parties to a treaty and, especially, of States sharing the same watercourse system. In that context it would be inadvisable to omit the word "system" when referring to such relations.

27. Article 16, paragraph 1, contained a sound definition of the term "pollution", which included the idea of thermal pollution, as the Special Rapporteur observed in paragraph (2) of his comments. But since, according to that definition, pollution resulted directly or indirectly from human conduct, he wondered whether it included natural causes of pollution of a watercourse. The State of origin had an obligation to prevent the passage of the pollution to another State, whatever its cause, and the duty of due diligence should apply to pollution by natural causes as well as to pollution due to the action of private individuals.

28. He agreed with the Special Rapporteur's view, expressed in paragraph (6) of his comments, that the liability of the State of origin was not a strict liability. The activity referred to was not a dangerous activity, in other words, one creating a risk of pollution, but a harmful activity, because if permitted it would certainly cause pollution above the threshold of tolerance. The State would therefore know of the pollution, or should know of it, and the passage quoted at the end of paragraph (6) of the comments rightly stated that there was violation of the obligation of due care only if the public organs of the State knew or "should have known" that certain conduct would give rise to inadmissible transfrontier water pollution. The word "should" indicated a value judgment to the effect that the State should give priority to ascertaining the result of certain activities and hence to obtaining the means to do so. That situation differed from the one covered by article 3 of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law,[7] the topic for which he was the Special Rapporteur, in that it concerned the harmful effects of an activity whose existence was easy to establish.

29. Paragraph 2 of article 16 prohibited the causing or permitting of the pollution of an international watercourse or its ecology; and paragraph 3 referred to the preparation of lists of substances or species to be prohibited. As he himself had found in the case of his own topic, the Special Rapporteur had found that it was not feasible to include such lists in a general convention and had left their preparation to a subsequent stage, as an obligation of the watercourse States at the request of one of them.

[7] See 2044th meeting, para. 13.

30. Article 17, in both paragraphs, established a duty of due diligence for States, both individually and in co-operation. Again, the liability was not strict, since it arose from failure in the duty of due diligence. But the question arose who held the subjective right corresponding to the obligation to exercise due diligence where the ecology of a watercourse was concerned. In other words, which was the State that was harmed within the meaning of article 5 of part 2 of the draft articles on State responsibility?[8] Perhaps article 17 could be interpreted as meaning that any State of the watercourse system which was a party to the proposed treaty could take action against the polluter, even though it was not directly harmed, for instance in the case of pollution outside its territory.

31. The words "or serious danger thereof", in both paragraphs, should be analysed. The obligation established in article 17 appeared to be one of prevention of a result, corresponding to article 23 of part 1 of the draft articles on State responsibility;[9] and the phrase "all reasonable measures" appeared to leave the means of preventing that result to the choice of the State having the obligation. The situation might be different if article 17 had referred to "internationally accepted standards".

32. Article 17 established an obligation for watercourse States to protect the environment of an international watercourse (para. 1) and the marine environment (para. 2) "from any impairment, degradation or destruction, or serious danger thereof". The article thus placed a "serious danger" of impairment, degradation or destruction on exactly the same plane as their actual occurrence. In other words, watercourse States would be required to take measures to prevent not only impairment, degradation or destruction, but also the creation of a "serious danger thereof".

33. A watercourse State would thus be placed in a very strange position. If it wished to avoid responsibility, it would have either to take measures that would totally prevent the creation of a "serious danger" or to prohibit the dangerous activity concerned altogether. The first course would be extremely difficult, for the State concerned might be obliged to prohibit all dangerous activities—a result which he did not believe the Special Rapporteur had intended.

34. Paragraph 2 of article 17 was much too broad. It could perhaps be read as also covering the marine environment within the jurisdiction of the affected State. That State, however, did not need the protection of article 17, because the part of the watercourse running through its territory would be polluted first and the marine environment only afterwards. Paragraph 2 would thus be establishing a protection for that State against itself. Could a State have an international obligation to prevent the pollution of its own watercourses in order to avoid pollution of its own marine environment?

35. Clearly, paragraph 2 of article 17 had a different purpose, which was to protect the marine environment against pollution from a downstream riparian State whose section of the watercourse flowed into the sea. It was a well-known fact that a major part of the pollution of the marine environment came from rivers. Provisions on the subject had already been adopted in article 194 of the 1982 United Nations Convention on the Law of the Sea.

36. Among the sources cited by the Special Rapporteur in support of article 17, he noted, in paragraph (2) of the comments, the passage from the third report by Mr. Schwebel to the effect that there had emerged "a normative principle making protection of the environment a universal duty even in the absence of agreement". In the same paragraph, the Special Rapporteur quoted a passage from the *Restatement of the Law, Foreign Relations Law of the United States (Revised)*, by the American Law Institute, which would make a State "responsible to all other States" for any violation of its obligations with respect to the environment and for any significant injury resulting from such violation. By including those quotations, the Special Rapporteur seemed to suggest that the obligations set out in article 17 should have an *erga omnes* effect in general international law. He had not, however, adduced much legal material in support of that view, except the provisions on protection of the marine environment in the 1982 United Nations Convention on the Law of the Sea, which did not appear to establish *erga omnes* obligations.

37. If a right of action were to be granted to "all other States" in the event of a violation of the obligations relating to the environment, the effect would be to attach to that violation one of the consequences of an international crime, namely, the right for all the States of the international community to consider themselves affected. That result could perhaps be admitted in the situation envisaged in paragraph 3 (*d*) of article 19 of part 1 of the draft articles on State responsibility,[10] which referred to "massive pollution of the atmosphere or of the seas"; but it would not be acceptable in regard to "appreciable harm".

38. Moreover, recognition of an *erga omnes* obligation would mean that a State accepting the instrument resulting from the draft articles would not be able to refuse to supply information requested by any State in the world concerning pollution at the mouth of a watercourse in its territory. He himself would have no objection to such a comprehensive measure of protection of the marine environment, but he seriously doubted whether it was feasible to propose it at the present time.

39. He had no comments at the present stage on article 18, which, in its broad lines, was consistent with the terms of the 1986 Convention on Early Notification of a Nuclear Accident and the relevant provisions of the 1982 United Nations Convention on the Law of the Sea.

Mr. Graefrath, First Vice-Chairman, took the Chair.

40. Mr. McCAFFREY (Special Rapporteur) said he would reply briefly to Mr. Barboza's question about pollution by natural phenomena. It had not been his in-

[8] See *Yearbook . . . 1986*, vol. II (Part Two), p. 39.

[9] *Yearbook . . . 1980*, vol. II (Part Two), p. 32.

[10] *Ibid.*

tention that article 16 should cover that situation. Under article 18, however, a State would be under the obligation to notify other watercourse States and to take appropriate measures of protection to prevent further harm. It should be noted that pollution due to cattle was the result of a human activity and not a natural phenomenon; that type of pollution would be covered by article 16.

41. Mr. Barboza had also raised the question of the possible *erga omnes* effect of the provisions of article 17 and of their relationship with the provisions of articles 21 and 23 of part 1 of the draft articles on State responsibility. In reply, he drew attention to paragraph (6) of his comments on article 16, to the effect that there was no intention to establish a régime of strict liability, but rather "one of due diligence to see that appreciable harm is not caused to other watercourse States".

42. Nor was there any intention to give an *erga omnes* effect to the obligations under article 17. In that regard, he drew attention to article 5 of part 2 of the draft articles on State responsibility, which defined the term "injured State" for the purposes of those articles. In that definition, the term "injured State" was said to cover, *inter alia*, a State party to the treaty which had been violated, where the obligation was expressly stipulated "for the protection of the collective interests of the States parties". The concept of "collective interests" was not clearly defined, but the idea embodied in paragraph 2 (*e*) (iii) of article 5 of part 2 of those draft articles was in clear contradistinction from that in article 19 of part 1 of that draft. He himself drew a very sharp distinction between the level of responsibility envisaged in his proposed article 17 and that contemplated in the aforementioned article 19. The obligations which flowed from the two provisions were entirely different. Those under article 19 on State responsibility had an *erga omnes* effect, but those under draft article 17 now under discussion certainly did not. Article 17 imposed an obligation akin to that under article 5 of part 2 of the draft articles on State responsibility, in which the focus was on collective interests.

43. Mr. YANKOV asked the Special Rapporteur whether the protection against pollution as defined in paragraph 1 of article 16 was intended also to cover the protection of natural amenities. He also wished to know whether pollution by radioactivity was covered.

44. Mr. McCAFFREY (Special Rapporteur) said that the reference at the end of paragraph 1 of article 16 to "the conservation or protection of the environment" would seem to cover natural amenities in the broad sense. Admittedly, it was not altogether clear to what extent those amenities would be protected. Some clarification could be introduced in the commentary.

45. On the second question, he thought that the reference to "any physical, chemical or biological alteration" covered pollution by radioactivity. The commentary could explain that point, but consideration might also be given to introducing the words "substances or energy" in the text of article 16 at an appropriate place.

46. The CHAIRMAN announced that the meeting would rise to enable the Drafting Committee to meet.

The meeting rose at 11.40 a.m.

2063rd MEETING

Thursday, 16 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, 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.

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

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)[3] (*continued*)

1. Mr. CALERO RODRIGUES said that he hesitated to speak at such an early stage of the discussion on draft article 16, since he disagreed with the Special Rapporteur on some points and had doubts with regard to the article. While sharing the view that pollution was the most serious problem arising in connection with international watercourses, he did not attach the same importance to the article as did the Special Rapporteur and some other members of the Commission. In his view, a single article on pollution was either too little or too much: too little if the Commission intended to develop rules on pollution, and too much if it considered that pollution was not different from other causes of harm.

2. As it stood, article 16 contained a definition (para. 1) and two rules (paras. 2 and 3). The definition, unlike those proposed by the previous special rap-

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

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

[3] For the texts, see 2062nd meeting, para. 2.