Document:-
A/CN.4/SR.1976

Summary record of the 1976th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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more firmly and convincingly in order to make the topic more acceptable to the international community.

67. Although several multilateral conventions provided for the duty to inform, negotiate and establish conciliation machinery in respect of a number of régimes, he was not certain that that duty existed as such in customary law. However, when a State found that an activity had the potential for causing harm and invited the source State to negotiate or to enter into conciliation, the source State had a duty to do so. In conclusion, he noted that, in the second report (A/CN.4/402, para. 57), the sentence

> ... Nor does it appear very logical that an affected State which does not provide under its domestic law for compensation for such occurrences should be allowed to claim it when the injury originates in a neighbouring State.

did not appear to follow logically from the two sentences that preceded it. Perhaps the Special Rapporteur could provide further clarifications in that regard.

The meeting rose at 12.50 p.m.

1976th MEETING

Thursday, 26 June 1986, at 10 a.m.

Chairman: Mr. Alexander YANKOV
later: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov.

International liability for injurious consequences arising out of acts not prohibited by international law (*concluded*) (A/CN.4/384,[1] A/CN.4/394,[2] A/CN.4/402,[3] A/CN.4/L.398, sect. H.1, ILC(XXXVIII)/Conf. Room Doc.5[4])

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. BARBOZA (Special Rapporteur), summing up the debate, said that he had adopted an overall approach to the topic because there were a number of points on which he wished the Commission to comment before he continued his study. The first was the unity of the topic, which at first sight seemed to have two aspects: that of prevention and that of reparation. He had considered it necessary to find a unifying criterion that was not purely formal. He had also wished to make it quite clear that prevention formed an integral part of the topic, since in the past it had been objected that liability arose only as a consequence of the non-fulfilment of an obligation. That explained the evolution of the meaning of the term "liability".

2. The second point was the need to define the scope of the topic, if only provisionally, while the third was the important issue of obligations. It was necessary to decide whether the Commission would venture into the ill-defined area of law-in-the-making or whether it would introduce real obligations into the schematic outline.

3. His fourth point concerned the operation and basis of what was known as "strict liability" and the extent to which the Commission could accept its mitigation and the obligation to make reparation. He believed that it was not a sufficiently rigorous theoretical argument to base reparation on the obligation of prevention and to recognize that, in the last analysis, reparation was based on strict liability. He had found it necessary to justify that view by pointing out that strict liability could be more or less strict and that the Commission could agree on the acceptable degree of strictness; in other words, it could recognize that the obligation of reparation was based on some form of strict liability and choose the model on which a consensus could be reached.

4. He had not gone into all the questions raised by members of the Commission. For example, Mr. Ogiso (1974th meeting) had observed that information might be withheld for security reasons or to safeguard trade secrets. He himself had not known whether the Commission would accept the obligation to provide information as it had been proposed, and he had therefore left it aside; but that certainly did not mean that he would not revert to it later. Another question had related to indirect injury, which was not yet a matter of concern because it was not known whether the obligation of reparation would rest on the foundations he had indicated. That was why he had not gone into the modalities of compensation for continuing injury, which would be considered at a later stage.

5. With regard to the scope of the topic, that was to say the delimitation of the activities to be studied, it had been suggested that a list of those activities should be drawn up. But it must not be forgotten that the purpose of the study was to establish a general régime and that, consequently, to enumerate the activities would mean using a drafting technique entirely different from that employed hitherto. Moreover, the General Assembly had requested the Commission to study all—and not only some of—the injurious consequences of activities

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[1] Reproduced in *Yearbook ... 1985*, vol. II (Part One)/Add.1.

[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[4] The schematic outline, submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session, is reproduced in *Yearbook ... 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline in R. Q. Quentin-Baxter's fourth report, submitted at the Commission's thirty-fifth session, are indicated in *Yearbook ... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

that were not prohibited. The Commission should also avoid freezing the topic and try to draft a set of rules applicable not only to activities that were hazardous at the present time, but also to those which might result from technological developments.

6. Some members had suggested that the topic should cover areas beyond national jurisdiction. For example, Mr. Roukounas (1975th meeting) thought that it could be extended to cover pollution in outer space and Mr. Balanda (*ibid.*) had mentioned the possibility of dealing with the problem of damage to areas forming part of the common heritage of mankind. That possibility had never been ruled out, and it certainly deserved further consideration. There were, however, many conventions dealing with questions of liability in such areas.

7. Mr. Ushakov and Mr. McCaffrey (1973rd meeting) had expressed the view that only ultra-hazardous activities should be taken into account. But such activities were difficult to define and some of them which were hazardous at the present time might no longer be so in the future, and vice versa. A dividing line also had to be drawn between such activities and those that were merely hazardous. Why restrict the basic principle that an innocent victim must not be left to bear loss or injury, by excluding merely hazardous activities? Mr. Balanda had objected to that possibility.

8. Mr. McCaffrey had suggested that the topic should not include activities that caused pollution. It was not certain that pollution was prohibited, and if it was not certain, how could a claim for compensation be justified without clear evidence of wrongfulness? What would happen in the event of extraordinary pollution caused by an accident? If pollution were simply prohibited, it might not give rise to compensation, whereas under the régime contemplated, compensation would, in principle, always be due as a logical consequence of strict liability. It should also be made clear that, between the two extremes of ultra-hazardous activities and activities which caused pollution, there was an intermediate category of those that were more hazardous than usual activities. Mr. Calero Rodrigues (1974th meeting) and Mr. Roukounas had asked for further particulars of the characteristics of hazardous activities. He would try to provide some in the future, but at the present stage of his work he was dealing only with generalities and a schematic outline.

9. The scope of the topic might be affected by the meaning given to the term "transboundary". According to some members, it applied only to adjoining countries; but it should, in fact, apply to any damage which went beyond the borders of a country, whether or not the affected country was a neighbour of the source country.

10. With regard to the obligations to provide information and to negotiate, Mr. Ushakov and several other members had asked who was to be informed in the case of activities which could have disastrous consequences and with whom negotiations were to be conducted. Such accidents were extremely rare and in most cases the countries which might be affected would not be difficult to identify: they would be the neighbouring countries, or perhaps only some of them. In the case of the Chernobyl nuclear power station, the Soviet Union's neighbours had not all been affected, let alone mankind as a whole. That plant was, however, in the heart of the Soviet Union. If that country built such a plant only a few kilometres from the Soviet-Finnish border, would it not have an obligation to inform Finland, and perhaps to negotiate with it?

11. The Soviet Union had requested that an international conference be held to discuss the matter; did that not mean that it believed it should provide information to IAEA member countries and that it would negotiate a security régime with them? He did not think that to be relieved of the obligation to provide information it was enough to notify an international organization or to convene an international conference. Moreover, unless an international convention went into great detail, it would merely lay down minimum security rules; it would not relieve States of their liability in the event of an accident.

12. Relevant experience had been gained in three of the cases mentioned in his second report (A/CN.4/402, footnote 40 (*d*)): the nuclear plant for the generation of electricity at Dukovany in Czechoslovakia, the Rüti nuclear plant in Switzerland and the construction of a refinery in Belgium near the border with the Netherlands.

13. On the question of the obligations to provide information and to negotiate concerning activities carried out on vessels under State control, he cited the example of nuclear-powered vessels, such as the *Otto Hahn* (Federal Republic of Germany) and the *Savannah* (United States of America), which had been the subject of many bilateral agreements between the countries of registry and countries which might be affected by the activities carried out on board those vessels. Under those agreements, the vessels were authorized to anchor in the ports of the States parties and there was a régime for compensation in the event of damage. A similar example was that of nuclear test explosions in outer space, which, at the time when they had been permitted, had been announced publicly and had led to the establishment of safety zones of which shipping was kept closely informed. In one case, compensation had been paid by the United States to crew members of the Japanese fishing vessel, the *Fukuryu Maru*.

14. Mr. Calero Rodrigues and Mr. Ogiso had said that the obligations to provide information and to negotiate should not be strict obligations. His own proposal had been simply to refer to general international law. If it was considered that general international law did not attach any consequence to the breach of such obligations, there would be nothing to lose by deleting the reference to a right of action in the schematic outline. On the other hand, if it was considered that general international law did give rise to adverse consequences, it could not be denied that the draft would place States in a worse position than they were in under general international law—and that would be neither fair nor advisable. He wished to make it quite clear in that connection that he had no intention of providing for penalties in the draft.

15. Some members of the Commission had said that they were in favour of complete, if not strict, obligations. He considered that the proposal to rule out any right of action was inequitable and would jeopardize fulfilment of the obligations to provide information and to negotiate. For example, if State A proposed to build a factory near its border with State B, which might be a future source of harmful emissions, and did not notify State B or supply it with information requested, would State B have to bear the risk and would it be deprived of any right of action so long as it had not suffered any injury? Would it have to wait until the investments made in State A had become irreversible, or at least until the problem had become much more difficult to resolve? In his view, State B had a right of reciprocity, a right to exert pressure and even to go so far as to take measures by way of reprisal.

16. Mr. Calero Rodrigues had said that he had been surprised to read in the report (*ibid.*, para. 46) that the obligation of reparation was really no more than prevention after the event. That idea, which had been taken from the previous Special Rapporteur's fourth report, was intended to demonstrate the unity of the topic; it meant that prevention and reparation both had the same purpose, namely to eliminate loss or injury. Although he did not object to that view, he was trying to find another idea which would demonstrate the profound unity of the topic.

17. Several members, including Mr. Tomuschat (1975th meeting), had referred to the role of international organizations. That was a question which warranted careful consideration and would be dealt with in greater detail at a later stage.

18. Mr. Balanda (*ibid.*) had drawn attention to the fact that some States were not in a position to know of all the activities being carried on in their territories, which might be very extensive and lacking in adequate means of communication, and that they could therefore not be held liable for activities carried on by individuals of whose existence they were not aware. In that connection, the question arose whether it would be appropriate to replace the term "source State" by "acting State".

19. Mr. Balanda had also said that he (the Special Rapporteur) appeared to think that failure to fulfil the obligations to provide information and to negotiate should not give rise to any right of action. As he had already indicated, however, that was not the case; he had proposed adverse procedural consequences, such as the fact of not being able to claim exceptions. Mr. Balanda also appeared to think that he did not have any definite ideas about the duty of care. Such a duty did, in fact, exist and he intended to set it out expressly in the draft articles.

20. Mr. Balanda also believed that the obligation of reparation was not autonomous and that it depended on too many circumstances. In fact, he (the Special Rapporteur) had been trying to find an area of agreement among the tendencies which divided the Commission. That might be done by applying the logic of strict liability, or of more or less strict liability, combined with the mitigation of liability, an example of which would be the concept of "shared expectations". Mr. Balanda had also referred to the possibility of establishing a régime of exceptions, which would be stated negatively, since the schematic outline already provided for too many conditions.

21. Several members had urged that due account should be taken of the developing countries' interests, of which they had given a number of examples. As he had already indicated, he would do everything possible to take those interests into account.

22. Various members of the Commission had expressed the opinion that the word "activities", rather than "acts", should be used in the English title of the topic. No dissenting opinion had been expressed, but that was a point which the Commission might deal with at a later stage.

23. The Commission's discussions had given him the impression that the main difficulties lay in matters of procedure, whereas a fairly broad consensus had been reached on principles. He warned the Commission that it would be quite dangerous to allow procedural problems to overshadow principles. For example, there had been no objection, except in terms of procedure, to the obligations of prevention, information and reparation. But it was his intention not to provide for strict liability without some kind of "mitigating" mechanism. He believed that the next step in the study of the topic should be the formulation of articles on the basis of the schematic outline and in the light of the discussions which had been held in the Commission and which would be held in the Sixth Committee of the General Assembly.

24. Sir Ian SINCLAIR noted that the Special Rapporteur had indicated that the role of international organizations within the framework of the topic would have to be examined. Referring to the Secretariat's survey of State practice relevant to the topic under discussion (A/CN.4/384), he asked whether the Special Rapporteur intended to update any information that might be relevant and possibly add further questions to the questionnaire that had been circulated. It would be helpful for the Commission to have the most up-to-date information available.

25. Chief AKINJIDE suggested that States should also be asked to update their information on the topic.

26. Mr. BARBOZA (Special Rapporteur), welcoming the suggestion made by Sir Ian Sinclair, said that the Secretariat's survey and the questionnaire would be updated and, if necessary, supplemented.

27. Mr. FRANCIS inquired to what extent the Special Rapporteur intended to make fundamental changes to the schematic outline at the present stage.

28. Mr. BARBOZA (Special Rapporteur) said that, as he had indicated in his summing-up, the study of the topic should be pursued on the basis of the areas of agreement that had emerged and the new possibilities that had come to light during the debate.

29. Mr. DÍAZ GONZÁLEZ said that the flexibility of the schematic outline would facilitate the Commission's work on the topic, especially since it was not yet known what approach the new Special Rapporteur would

adopt. The Commission could not work within a rigid framework.

Mr. Barboza took the Chair.

The law of the non-navigational uses of international watercourses (A/CN.4/393,[5] A/CN.4/399 and Add.1 and 2,[6] A/CN.4/L.398, sect. G, ILC(XXXVI)/Conf.Room Doc.4)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

NEW DRAFT ARTICLES 10 TO 14

30. The CHAIRMAN invited the Special Rapporteur to introduce his second report on the topic (A/CN.4/399 and Add.1 and 2), as well as the new draft articles 10 to 14 contained therein, which read:

Article 10. Notification concerning proposed uses

A [watercourse] State shall provide other [watercourse] States with timely notice of any proposed new use, including an addition to or alteration of an existing use, that may cause appreciable harm to those other States. Such notice shall be accompanied by available technical data and information that is sufficient to enable the other States to determine and evaluate the potential for harm posed by the proposed new use.

Article 11. Period for reply to notification

1. A [watercourse] State providing notice of a proposed new use under article 10 shall allow the notified States a reasonable period of time within which to study and evaluate the potential for harm entailed by the proposed use and to communicate their determinations to the notifying State. During this period, the notifying State shall cooperate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not initiate, or permit the initiation of, the proposed new use.

2. If the notifying State and the notified States do not agree on what constitutes, under the circumstances, a reasonable period of time for study and evaluation, they shall negotiate in good faith with a view to agreeing upon such a period, taking into consideration all relevant factors, including the urgency of the need for the new use and the difficulty of evaluating its potential effects. The process of study and evaluation by the notified State shall proceed concurrently with the negotiations provided for in this paragraph, and such negotiations shall not unduly delay the initiation of the proposed use or the attainment of an agreed resolution under paragraph 3 of article 12.

Article 12. Reply to notification; consultation and negotiation concerning proposed uses

1. If a State notified under article 10 of a proposed use determines that such use would, or is likely to, cause it appreciable harm, and that it would, or is likely to, result in the notifying State's depriving the notified State of its equitable share of the uses and benefits of the international watercourse, the notified State shall so inform the notifying State within the period provided for in article 11.

2. The notifying State, upon being informed by the notified State as provided in paragraph 1 of this article, is under a duty to consult with the notified State with a view to confirming or adjusting the determinations referred to in that paragraph.

3. If under paragraph 2 of this article the States are unable to adjust the determinations satisfactorily through consultations, they shall promptly enter into negotiations with a view to arriving at an agreement on an equitable resolution of the situation. Such a resolution may include modification of the proposed use to eliminate the causes of harm, adjustment of other uses being made by either of the States, and the provision by the proposing State of compensation, monetary or otherwise, acceptable to the notified State.

4. The negotiations provided for in paragraph 3 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and interests of the other State.

Article 13. Effect of failure to comply with articles 10 to 12

1. If a [watercourse] State fails to provide notice to other [watercourse] States of a proposed new use as required by article 10, other [watercourse] States which believe that the proposed use may cause them appreciable harm may invoke the obligations of the former State under article 10. In the event that the States concerned do not agree upon whether the proposed new use may cause appreciable harm to other States within the meaning of article 10, they shall promptly enter into negotiations, in the manner required by paragraphs 3 and 4 of article 12, with a view to resolving their differences.

2. Subject to article 9, if the notified State fails to reply to the notification within a reasonable period in accordance with article 12, the notifying State may proceed with the initiation of the proposed use, in accordance with the notification and other data and information communicated to the notified State, provided that the notifying State is in full compliance with articles 10 and 11.

3. If a [watercourse] State fails to provide notification of a proposed use as required by article 10, or otherwise fails to comply with articles 10 to 12, it shall incur liability for any harm caused to other States by the new use, whether or not such harm is in violation of article 9.

Article 14. Proposed uses of utmost urgency

1. Subject to paragraph 2, a State providing notice of a proposed use under article 10 may, notwithstanding affirmative determinations by the notified State under paragraph 1 of article 12, proceed with the initiation of the proposed use if the notifying State determines in good faith that the proposed use is of the utmost urgency, due to public health, safety, or similar considerations, and provided that the notifying State makes a formal declaration to the notified State of the urgency of the proposed use and of its intention to proceed with the initiation of that use.

2. The notifying State may not proceed with the initiation of a proposed use under paragraph 1 unless it is in full compliance with the requirements of articles 10, 11 and 12.

3. The notifying State shall be liable for any appreciable harm caused to the notified State by the initiation of the proposed use under paragraph 1, except such as may be allowable under article 9.

31. Mr. McCAFFREY (Special Rapporteur) first drew attention to Conference Room Document 4, circulated at the Commission's thirty-sixth session, in 1984, which had been reissued for convenient reference to the articles provisionally adopted in 1980,[7] the provisional working hypothesis accepted in 1980[8] and the other draft articles submitted by the previous Special Rapporteur.[9]

32. Introducing his second report (A/CN.4/399 and Add.1 and 2), he pointed out that it contained two substantive chapters: chapter II, which dealt with general views on draft articles 1 to 9 submitted by the

[5] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[6] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[7] The texts of articles 1 to 5 and X and the commentaries thereto, provisionally adopted by the Commission at its thirty-second session, appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

[8] *Ibid.*, p. 108, para. 90.

[9] The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

previous Special Rapporteur in his second report[10] and referred to the Drafting Committee in 1984,[11] and chapter III, which contained the five new draft articles 10 to 14. Chapter II was quite long and detailed, because he had thought it important to lay before the Commission, for the first time during the current quinquennium of membership, the overwhelming support for the most fundamental principles of the work on the topic: equitable utilization and *sic utere tuo ut alienum non laedas*.

33. That support could be divided into four categories. The first contained citations from, and brief descriptions of, treaty provisions concerning contiguous and successive watercourses, which were contained in annexes I and II to chapter II of the report. He would be grateful if any members who had information not listed in those annexes would apprise him of it. The second category covered positions taken by States in diplomatic exchanges, to which a controlling weight could not be assigned, but which would be of use to the Commission in its work. The third category comprised decisions of international courts and tribunals, which were discussed in the report (*ibid.*, paras. 101-133). The fourth category comprised other international instruments, such as declarations and resolutions of intergovernmental conferences, reports by expert groups and intergovernmental organizations, and studies by international non-governmental organizations (*ibid.*, paras. 134-155). Some of the material had been placed before the Commission earlier, but not in its present analytical framework.

34. Four points arose in connection with draft articles 1 to 9 referred to the Drafting Committee. In regard to the definition of the term "international watercourse [system]", which he discussed in his report (*ibid.*, paras. 60-63), he noted that the Commission had on several occasions decided to allow its approach to develop unconstrained by a definition *ab initio*. As to the "shared natural resource" concept (*ibid.*, paras. 71-74), while he had no objection to that concept, he did recognize that it had given rise to controversy in the past. Strictly speaking, he did not believe it was necessary to apply it in the context of the work in hand. The legal content of the concept could be expressed in other ways and more concretely in other articles.

35. On the question whether the factors listed in paragraph 1 of article 8 (Determination of reasonable and equitable use) should be included in an article or in the commentary to an article, it would be useful to have the views of members. In the discussions on that issue in 1983 and 1984, several senior members had taken the view that the factors listed in that article did not really represent law, but were simply an indicative list of the kinds of circumstances that could be relevant to the determination of equitable use. They had believed that it would be sufficient to retain something along the general lines of the introductory part of paragraph 1.

36. The fourth question to which he wished to draw attention was whether article 9 (Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States) should be framed solely in terms of "appreciable harm", or whether it should be expressly recognized in the article itself that an equitable apportionment might well entail some degree of "appreciable harm" in the form of unmet needs in one or more of the States concerned. He dwelt on that question in his report (*ibid.*, paras. 171-187), and confirmed his adherence to the maxim *sic utere tuo ut alienum non laedas*, by virtue of which a State was required to refrain from causing harm to another State through the use of an international watercourse. The provisions of article 9 were intended as an expression of that principle adapted to international watercourses in a manner consistent with the principle of equitable utilization.

37. The issue of equitable utilization usually arose where the water available was insufficient—in quantity, quality or otherwise—to satisfy the needs of two or more States using the watercourse. The object of equitable apportionment was to maximize the benefits and minimize the harm to the States concerned. If the supply of water was inadequate, equitable apportionment would result in unmet needs for one or more States. It would therefore be much clearer and legally more precise not to refer in article 9 to "appreciable harm", but to introduce the concept of prohibition of causing legally redressable injury. The term "injury" meant a legally recognizable instance of factual harm. Article 9 would thus deal with the duty to refrain from causing harm that was not consistent with equitable apportionment.

38. In his report (*ibid.*, paras. 182-184), he had put forward three alternative redrafts for article 9. Those texts were not formal proposals; they were intended only to illustrate possible means of reconciling the principle *sic utere tuo ut alienum non laedas* with the principle of equitable apportionment. He therefore asked members not to dwell on the actual drafting, but to express their views on the general question whether article 9 should speak only of "appreciable harm" or be brought into line with the principle of equitable apportionment.

39. Before proceeding to introduce the five new draft articles submitted in his report, he recalled that, at its thirty-second session, in 1980, the Commission had adopted six articles—articles 1 to 5 and X—and had accepted a provisional working hypothesis on the meaning of the term "international watercourse system". At its thirty-sixth session, in 1984, when it had referred to the Drafting Committee draft articles 1 to 9 submitted by the previous Special Rapporteur in his second report, the Commission had decided that the Committee should also have before it the provisionally adopted articles 1 to 5 and X, the provisional working hypothesis and draft articles 1 to 9 as submitted by the previous Special Rapporteur in his first report.[12]

40. Turning to the five new draft articles 10 to 14, concerning procedural rules applicable in cases involving

[10] For the texts of these articles and a summary of the Commission's discussion on them at its thirty-sixth session, see *Yearbook ... 1984*, vol. II (Part Two), pp. 89 *et seq.*, paras. 291-341.

[11] *Ibid.*, pp. 87-88, para. 280.

[12] *Ibid.*, p. 88, footnote 285.

proposed new uses of watercourses, he suggested that, in view of the lack of time, the best course would probably be to hold a general discussion and deal only with the main thrust of the articles. The discussion would provide guidance for a possible reformulation of the draft articles in the report to be submitted at the next session. Each article was followed by "comments", which were not intended as a commentary: they were merely explanatory notes giving sources or references to earlier texts.

41. It would be useful to focus on the situations to be covered, rather than on the precise wording of the draft articles. Once agreement had been reached on the situations and on how to cover them, it should not prove difficult to find generally acceptable formulations. The different possible situations, discussed in the report (*ibid.*, paras. 192-197), fell into two general categories, the first of which was that of problems concerning existing uses, which were adequately dealt with in paragraphs 1 and 2 of article 8 as referred to the Drafting Committee.

42. The second general category (*ibid.*, paras. 195-197) could be divided into two subcategories of situations. The first was that of a State wishing to initiate a new use which might have significant adverse effects on another State's use of a watercourse. That situation was dealt with in chapter III of the outline for a draft convention submitted by the previous Special Rapporteur, and in the five new draft articles he himself had submitted. The second subcategory was that of a State wishing to make a new use, but being factually unable to do so because of the uses being made by another State. That situation was not expressly provided for in either chapter II or chapter III of the outline for a convention; he had therefore invited members to express their views on how to deal with it (*ibid.*, para. 197, *in fine*).

43. Introducing the five new draft articles 10 to 14, he explained that they dealt with new uses and, in particular, with the first subcategory of situations he had mentioned, where one State wished to make a new use which might have significant adverse effects on other States using the same international watercourse. The articles dealt with the same general subject-matter as draft articles 11 to 14 submitted by the previous Special Rapporteur and discussed by the Commission in 1983 and 1984.

44. Draft article 10 dealt with notification concerning proposed new uses that might cause appreciable harm to other States. Paragraph (9) of the comments on that article explained that the reference to "available" technical information meant that the notifying State was generally not required to do additional research at the request of the potentially affected State, but only to provide such relevant information as already existed and was readily accessible.

45. Draft article 11 dealt with the period for reply to notification. Paragraph (2) of the comments explained that the article referred to a "reasonable" period of time because a specific period, such as six months, might be unreasonably long in some cases and unreasonably short in others. The Commission would have to give careful consideration to the choice between that formula and a definite time-limit.

46. Draft article 12 dealt with the reply to notification, consultation and negotiation concerning proposed uses. Its provisions were important, but sufficiently self-explanatory not to require further comment at the present stage.

47. Draft article 13 dealt with the effect of failure to comply with articles 10 to 12. Paragraph 3 specified that a State failing to provide notification of a proposed use would incur liability for any harm caused to other States by that use, even if such harm was not in violation of article 9. The previous Special Rapporteur had suggested that the procedures provided for in article 13 should be linked with the dispute-settlement mechanism.[13]

48. Draft article 14 dealt with situations of the utmost urgency in which the notifying State needed to proceed with the proposed use immediately, for example for public health or safety reasons, as indicated in paragraph 1. That exception, however, should not be made so broad as to swallow the rule itself, hence the good faith requirement mentioned in paragraph (3) of the comments.

49. As he stressed in his concluding remarks (*ibid.*, para. 199), those draft articles were not intended to be all-encompassing. In particular, they did not deal with such situations as, first, State A believing that State B was exceeding its equitable share, and secondly, State A wishing to make a new use of the watercourse but being factually unable to do so because of the uses being made by State B. He would welcome the views of members on those questions, as well as on the four points he had mentioned concerning articles 1 to 9 and on the set of procedural rules proposed in the new draft articles 10 to 14.

50. Mr. USHAKOV said that, if he was to take a position on the Special Rapporteur's proposals, he would first have to know why they were being made. For although the topic of the law of the non-navigational uses of international watercourses had been under study for 15 years, the object to be achieved was still not known. In any event, it would be absolutely pointless to try to elaborate draft articles, as the first two Special Rapporteurs had proposed, with a view to the adoption of an international convention. The uses of international watercourses concerned riparian States, and it was for them to define the legal status of the watercourse system they shared and to regulate its use. Riparian States would not be able to accept a convention of universal scope in which non-riparian States imposed on them a régime which was not their own. A convention ratified by 50 States, only 2 of which might be riparian States, would be of no value whatsoever.

51. There would also be no point in trying, as the third Special Rapporteur, Mr. Evensen, had suggested, to draft a framework convention, that was to say a binding instrument containing general rules that would have to be elaborated in agreements between riparian States. Like a general convention, and for the same reasons, such an instrument would be worthless. Moreover, it

[13] See *Yearbook ... 1984*, vol. I, p. 102, 1831st meeting, para. 12.

could not stand on its own, because it would have to be supplemented by special agreements between riparian States.

52. In fact, if the Commission wished to do useful work, it should confine itself to making recommendations. It might draft a very general definition of an international watercourse, or several variants between which riparian States could choose, on the understanding that, if they did not find any of the proposed definitions satisfactory, they could adopt another. Of the very detailed provisions the Commission might draft, riparian States could choose those they found suitable, or only some of the rules they contained.

53. If the Commission adopted that approach, the difficulties would be reduced; but if it tried to draft generally acceptable binding rules, its efforts would be in vain, because in that sphere the interests of States were divergent and even the views of members of the Commission were hard to reconcile.

54. Mr. McCAFFREY (Special Rapporteur) said that the issue raised by Mr. Ushakov had been before the Commission since the General Assembly had referred the topic to it in 1970. It was striking that, in the Sixth Committee of the General Assembly, very great interest had been shown by many States in the topic of international watercourses. When Mr. Schwebel had been Special Rapporteur, the Commission had decided to structure its work on the topic in the form of a framework instrument. The purpose of that instrument would be to provide guidance to States in solving their watercourse problems. States would thus be able to apply and adjust the provisions of the Commission's draft to suit their particular needs.

55. To say that the draft would have the form of a framework instrument was not to deny its usefulness. Many of its provisions constituted the application to international watercourses of general principles of international law. A clear statement of those principles would undoubtedly assist States and help them to avoid disputes.

56. It was the Commission's custom to refrain from making any recommendation to the General Assembly on the fate of its drafts until the work on each topic had been completed. Moreover, any recommendation made by the Commission at the present stage—for example that a codification conference be convened—would not be binding on the General Assembly, which could always decide to give the draft the form of a declaration or a set of recommendations. The awareness of that fact should not, however, inhibit the Commission at the present stage of its work.

57. Mr. FRANCIS said that, as a citizen of a small island State, he would refrain from dwelling at length on the topic of international watercourses. He wished mainly to comment on Mr. Ushakov's remarks. It was certainly correct to say that the Commission would be wise not to attempt to prepare a draft convention for riparian States; but he could endorse the Special Rapporteur's remarks regarding the great interest shown in the topic. He himself recalled the statements made by the representatives of many riparian States in the Sixth Committee during the discussion on the topic, which had also been studied by the Asian-African Legal Consultative Committee. The final result of the Commission's work might well be to provide guidelines—or perhaps a handbook—for riparian States. At the present stage, however, the Commission should press on with its work and leave the ultimate fate of the draft to the General Assembly.

The meeting rose at 1 p.m.

1977th MEETING

Friday, 27 June 1986. at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/393,[1] A/CN.4/399 and Add.1 and 2,[2] A/CN.4/L.398, sect. G, ILC (XXXVI)/Conf.Room Doc.4)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

NEW DRAFT ARTICLES 10 TO 14[3] (*continued*)

1. Mr. FLITAN congratulated the Special Rapporteur on the scientific precision with which he had introduced his second report (A/CN.4/399 and Add.1 and 2), which contained very interesting ideas on a very sensitive topic.

2. Before turning to draft articles 1 to 9 referred to the Drafting Committee in 1984, he wished to comment on a matter of principle which had already been discussed at some length, namely the form that the draft articles should take. In view of the different situations to be taken into account, and to avoid any misunderstanding, it would be better for the draft to consist simply of recommendations to States. The Commission had been requested by the General Assembly to formulate a framework agreement, not a draft convention. The ex-

[1] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[3] For the texts, see 1976th meeting, para. 30. The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.